United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

74-1188 ORIGINAL

To be argued by
JOHN F. MARTIN
LOUIS F. MASCARO
MICHAEL P. DIRENZO

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In The

United States Court of Appeals

For The Second Circuit

UNITED STATES OF AMERICA,

Appellee,

vs.

THOMAS JOSEPH CARROLL, VINCENT McCLOSKEY and WILLIAM McCLOSKEY,

Defendants-Appellants.

On Appeal from the United States District Court for the Southern District of New York.

JOINT BRIEF FOR DEFENDANTS-APPELLANTS

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

DOCKET NO.

74-1138

vs.

THOMAS JOSEPH CARROLL, VINCENT McCLOSKEY and
WILLIAM McCLOSKEY,

Defendant-Appellants.

BRIEF FOR DEFENDANT-APPELLANT, THOMAS JOSEPH CARROLL
VINCENT McCLOSKEY and WILLIAM McCLOSKEY

STATEMENT

Defendant-Appellant, Vincent McCloskey, and co-defendant-appellants, Thomas Joseph Carroll and William McCloskey, appeal to this Court from the Judgment of the United States District Court for the Southern District of New York rendered the 25th day of January, 1974 convicting them of unlawfully, wilfully and knowingly with malice aforethought and in the perpetration and attempted perpetration of a robbery, murdering and killing an employee of the U.S. Post Office in violation of Title 18, U.S.C., Sections 1111 and 1114, and convicting them of assaulting a person having lawful charge, control and custody of mail matter and property of the United

States with intent to rob, steal and purloin such mail matter and in the process, wounding and putting in jeopardy the life of such person by use of a dangerous weapon, to wit: a 32 caliber revolver, (Title 18 U.S.C. Section 2114), and convicting them of conspiracy to rob a mail truck and to put in jeopardy the lives of custodians of the mail matter by the use of dangerous weapons, (Title 18, U.S.C. 1708 and 2114). Trial before Judge Metzner and a jury of two indictments, No. 73 Criminal 855 and No. 73 Criminal 952, alleging the same substantive counts which were joined by order of the Court for purposes of trial.

The defendant-appellants were sentenced to a term of life on the murder count, 25 years on the assault count and five years on the conspiracy count. Sentences on the conspiracy count and the assault count are to run concurrently with each other and concurrently with the sentence on the murder count.

INTRODUCTORY FACTS

Count 1 of the Indictment charged a conspiracy from January 1, 1973 to September 1, 1973 and October 17, 1973. 73 Criminal 855 named Carroll, V. McCloskey, Mann, Myers, Paul Crawford, Chester Crawford and John Turner as defendants and superceded 606 which was filed on June 19, 1973 and named "John Doe" instead of John Turner along with the other defendants and this superceded 583 filed June 11, 1973 under which the defendants, V. McCloskey and Carroll were originally arraigned and placed under $200,000.00 bail each. They have been incarcerated since then until now.

855 proceeded to trial joined with 972 filed October 17, 1973 naming W. McCloskey and Johnson as defendants. Both indictments charge the same counts and wording except for the names and termination date.

Count 1 is a conspiracy charge against the defendants to violate Sections 1708 and 2114 Title 18 between January 1 to date of the filing, in that they conspired to:

a) steal and take mail bags from a U.S. mail truck.

b) In attempting to carry out a robbery of persons in custody of mail and to put in jeopardy the life of said persons by using dangerous weapons.

Three overt acts are listed, two being some weeks prior to the time charged in the substantive counts and consisting of a meeting and a visit to an area in New York. The third act is April 5, 1973, the same day as alleged in the substantive

counts and consisted of a meeting at a delicatessen.

Count 2 charges murder under Sections 1111, 1114 & 2 of Title 18 in that with malice aforethought and in attempting to perpetrate a robbery, murdered and killed William Hickey while he performed his duties as a postal employee.

Count 3 charges assault under Section 2114 & 2 of Title 18 in that the defendants assaulted Lawrence who had custody of mail which they intended to rob and in effecting and attempting to rob they wounded and put in jeopardy the life of Lawrence by the use of a dangerous weapon, to wit: a .32 revolver. Defendants were convicted on all counts and received sentences which the court felt was mandatory on counts 2 and 3 (39).

On September 17, 1973, co-defendants, Crawford, Myers and Mann pleaded guilty to a lesser included offense under Count 2 to wit: Murder in the second degree and were sentenced to 25 years with a recommendation for incarceration near home (40); Chester Crawford has yet to be sentenced (2186).

Defendant Paul Crawford pleaded guilty to conspiracy and was sentenced to 4 years (41). Defendant Turner pleaded guilty to Count 1 and a lesser included offense in Count 3. He was sentenced to 10 and 5 years to run concurrently (41).

Throughout the proceedings, defendants, Turner, Rippy, Chester Crawford, Paul Crawford, Myers and Mann, were all represented by assigned counsel and paid by the Government (5-22).

Issue of mental compentency of V. McCloskey was raised in

September (82). Medical reports given to Court (48, 50) and Court ordered him to Springfield Mo. on question of compentency (2840).

ON SEPTEMBER 17, the following happended: Court denied motion to have state court try case because of more favorable rule of accomplice testimony (2809); Carroll pleads not guilty; Turner severed after not guilty plea; Court adjoined trial indefinitely (2851-2852) after wire taps involving V. McCloskey and Carroll discovered; Turner's status as informer, co-defendant, cooperator, with co-counsel questioned.

ON SEPTEMBER 21, court has hearing with Goldberg and Hafetz, attorneys for V. McCloskey and Rippy, advises Goldberg to get someone else to represent client (2863); court and Goldberg discuss previous release of V. McCloskey's co-counsel Hopper (2879); concern for jury prejudice during Christmas expressed by Court (2882-2884).

ON NOVEMBER 13, discussion re trial date and status of defendant McCloskey; defendant McCloskey returned from Springfield Mo. (2892-2901).

ON NOVEMBER 20, conference between court and V. McCloskey's lawyer; V. McCloskey directed to get new defense counsel and previous counsel would not return the fee (2905-2918).

ON NOVEMBER 27, court appointed Panzer to represent McCloskey with Government to pay fee (2923-2925).

MINUTES OF DECEMBER 4, court appoints John F. Martin, Esq., to represent V. McCloskey and directs trial to proceed December 10.

ON DECEMBER 8, multiple motions (2760) made by V. McCloskey and denied by court.

ON DECEMBER 10, V. McCloskey pleads not guilty; trial commences; jury empaneled; pros se motion by Carroll for acquittal under Rule 7; Bill of Particulars filed by Government naming 3 co-conspirators; openings conducted; court directs objection by one counsel is deemed objection by all; court directs counsel to limit cross-examination with no repetition by other counsel and court adjourned (351-354).

ON DECEMBER 11, trial continued; order under Section 6002 title 18 filed granting Chester Crawford immunity for testimony concerning facts of robbery on March 22, 1973 not mentioned in indictment (368-371, 494-520); bill of particulars disclosure; (368-371); order denies motion to prevent introduction of outside criminal acts; two jurors removed and alternates substituted; Lawrence, Government witness testifies to evidence of April 5, Exhibit 1 & 2 in evidence; Para testifies postal employment records of Hickey and W. McCloskey; witness Green, ambulance driver, testifies; court denies indictment deficiency motion made by Carroll; Mrs. Souvenir testifies; Patrick Corcoron, police witness testifies on question of identity only. Chester Crawford, co-defendant accomplice felon testifies. Reference made to Maria Vasquez.

ON DECEMBER 12, court denied motion by defendant to exclude Rippy's oral admissions; witness Dexter testifies regarding oral

admissions of Rippy; defendants request to charge filed (page 18 old record).

ON DECEMBER 13, order under 6002 granted to Mann (169), Myers (176), Paul Crawford (162), for events of March 22, 1973, same as Chester Crawford; defendant, accomplice killer witness, Myers testified; court advises jury that he is not going to keep it open Christmas and there will be night sessions (1089-1091)=Exhibits 8-12 in evidence.

ON DECEMBER 14, trial continues.

ON DECEMBER 17, new bill of particulars given by Government listing two new co-conspirators; court grants motions by government quashing trial-subpoena of defense for post office records (1092-1095); no hearing held (1092-1095); court tells jury that they will sit until 6:30 each day because he wants case finished before Christmas and if cross-examination is going to take as along as it has, it is the only way we can do it (1097); witness Myers identifies weapon as a .38 caliber; defendant accomplice witness Mann testifies; witness Cafasso testifies; Exhibit 30 identified; witness Helvey identifies Exhibit 31 as telephone number of L. Myers; witness Dietrich testifies.

ON DECEMBER 18, trial continues; prosecutor indicates he is not calling Johnson as witness; discussion about status of regular mail truck driver and (1308) regular guard on mail truck and availability to defense counsel; witness Di Georgio tells

of robbery of March 22, witness Duda testifies and identifies Exhibit 18, 19 & 20; witness Dunning identified Exhibits 21, 22, 23 & 24.

ON DECEMBER 19, witness Prettitori testifies; witness Sagliano testifies; witness Kenerson testifies; witness Wall testifies; defendant-accomplice-informer-witness Turner testifies; order of immunity under 6002 granted Turner for testimony of events of March 22, 1973; order by Judge made authorizing payment of $152.00 for Panzer as defense counsel for V. McCloskey (252).

ON DECEMBER 20, trial continues; witness Kievit, postal inspector, testifies over objection; summarizes documentary evidence for jury, testifies of oral admission of V. McCloskey; Government's case closed; motion for acquittal denied; defense rests; motion for acquittal denied; court discusses length of summations and brings jury back during long Christmas weekend (1944, 1997, 1998).

ON DECEMBER 21, prosecutor offers Exhibit 4F; a list of 3500 material; defense counsel objects and indicates that he did not receive 3500 material relating to the list of witnesses on the stand, Kievit, the postal inspector in charge of the case; motion made to reopen the case to examine the witness after obtaining and reading 3500 material; motion denied; no hearing held (2011); rulings on charge; jury excused for the day.

ON DECEMBER 24, summations by four defense counsels and the

prosecutor; prosecution asks the jury to infer that the white-men defendants used black-men from Washington for dirty work (2135); motion for mistrial denied.

ON DECEMBER 25, no court sessions, Christmas.

ON DECEMBER 26, judge charges; additional requests to charge denied; jury sent out to deliberate; jury returns and requests reading of testimony; court directs one day testimony of two witnesses; reading of cross-examination limited to those days with selective and limited culling of applicable cross-examination from the record; court permits re-direct testimony by prosecution to be brought in; motion made for mistrial denied; jury verdict returned; motions reserved.

ON JANUARY 25,1974, multiple motions of acquittal and for trial events made by the defendants denied by court (2933); defendant Carroll not represented by counsel; counsel in hospital and requested court to consider all motions made by co-counsel, which was granted by the court (2936); trial defendants, Carroll, V. McCloskey and W. McCloskey remanded to marshall (2933).

POINT 1

THE COURT ERRED SUBSTANTIALLY IN ITS CHARGE TO THE JURY AND ITS ERROR WAS HIGHLY PREJUDICIAL TO DEFENDANTS

The primary purpose of the Court's charge to the jury is to define the issue in the case and the processes to be used in deciding those issues so that the jury understands what they are called upon to decide and the steps they are to take in arriving at a verdict. This presupposes that the Judge has correctly stated the law applicable to the case and has defined the issues based upon the evidence introduced into the record. Has the Court proved this task? Let us examine the record.

During its charge the Court made the following errors:

a/ Instructed the jury that the only crime which they may find the defendants guilty of under Count 2 of the indictment, was murder in the first degree (2188 through 2192).

b/ It failed to instruct that they could find defendants guilty under this count, of second degree murder under Section 1111;

c/ It failed to instruct that they could find defendants guilty under this count, of manslaughter under Section 1112.

d/ It denied defendants Request to Charge, 21-(9), (3082), to the effect that defendants could be convicted of inferior degrees.

Plain errors or defects affecting substantial rights may be noticed although not brought to the attention of the court. (Fed. Practice and Procedure Rule 52(b).

The court instructed the jury that it could find defendants guilty of murder in the first degree on two theories (2188) in accordance with Sections 1111, 1114 and 2, consisting of five elements; (1) that Hickey was unlawfully killed by Terrence Dewey Myers on 4/5/73; (2) that Hickey was a U.S. postal employee on duty; (3) that the killing was done by Myers with malice aforethought; (4) that the killing was committed in the perpetration of a robbery and (5) that defendants aided and abetted Myers in the attempted robbery.

In reviewing the Third element, malice aforethought, the Court instructed the Jury (2190):

> "You <u>may</u> find that malice aforethought existed when the act which imports danger to another is done so recklessly or wantonly as to manifest depravity of mind and disregard of human life."

The court further told the jury that they were permitted to draw the inference of malice from the use of a deadly weapon during a felony in which another person is killed even though accidently.

This <u>permits</u> the jury to find malice or to infer malice. It does <u>not require</u> the jury to find malice and they could find that a killing was committed without malice.

The fifth element was that defendants knowingly, wilfully aided and abetted Myers in the attempted robbery of the mail truck and its contents. This required a specific finding by the jury that the attempted robbery was of a mail truck and of its

contents as spelled out in Section 2114 (2191).

The court then went on and gave the jury an alternate theory under which to find the defendants guilty of first degree murder as charged in Count 2. According to this alternate theory, the jury could find:

> (1) the defendants guilty if they first found them guilty of the conspiracy charged in Count 1;
>
> (2) find beyond a reasonable doubt that the killing was committed by another member of the conspiracy;
>
> (3) that such act was one which the defendants might reasonably have foreseen might occur even though accidental and that they could be found guilty of first degree murder even if the defendants did not directly participate in the acts constituting the crime charged.

The element of malice aforethought was not an element charged under the alternate theory, nor did it charge the element that the party killed was engaged in his post office employment, nor did it require any aiding or abetting by defendants, nor even that an attempted robbery occurred.

This charge, in essence, (2192/2193), was that the defendants, as conspirators, were liable for the acts of co-conspirators if those acts were made during the pendency of a conspiracy in furtherance of their objectives and were within the scope of the conspiracy as defendants saw it. Under this alternate theory, the court failed to charge murder in the second degree or manslaughter.

The alternate theory charged was totally erroneous and in complete conflict with Count 2 of the indictment under which defendants were charged and which contains all five elements which the Court instructed was to be found by them beyond a reasonable doubt in its primary theory of murder in the first degree expounded to the jury on pages 2188 to 2192 (line 13).

Section 1111(a) requires malice aforethought for all murder. Section 1111(a) lists two cases specifically requiring premeditation where a killing can result in murder and also lists four underlying felonies; arson, rape, burglary or robbery during which, if a killing occurs, a defendant can be charged with felony murder. It does not list conspiracy as one of those felonies.

Section 1111(a) also lists "any other murder" as murder in the first degree being those murders specifically spelled out in the second sentence of (a).

Count 2 of the indictment charges defendants unlawfully, wilfully and knowingly with malice aforethought and in the perpetration and attempted perpetration of a robbery, in violation of Title 18, U.S. Code, Section 2114, with murdering and killing Hickey, a Post Office employee engaged in his duty of guarding a mail truck. The Citation in such Count is Title 18, U.S. Code, Sections 1111 - 1114 and 2, Title 18. The Citation in the body refers to Section 2114 of Title 18. The felony referred to is robbery not conspiracy.

Rule 6 under the Fifth Amendment of the Constitution authorizes

a grand jury to hand down indictments and to present them to the court. Rule 7 requires that Citations of the applicable law be cited and the omission or error in such Citation can only be overlooked where there is no prejudice to the defendants.

The alternate theory charged by the court was wrong and prejudicial even if charges covering murder second and manslaughter were added to it. It is error because the defendants were not charged under Count 2 of the indictment with the commission of a conspiracy under which any act committed by one co-conspirator could hold them for trial for murder 1. Their case was t ried, defended, prepared and planned according to the material allegations of the indictment and to charge at the end of the case that they can be found guilty of a felony not listed in Section 1111 and not spelled out in Count 2 and that malice need not be found although required both by statute and indictment; that a robbery need not have occurred although required by the statute and indictment; and by the deceased not being required to be a postal employee, although required both by statute and indictment; and by a robbery attempt not being required, although required under Section 2114 and against a postal truck, although required by statute and indictment, changes the game from hockey to tennis.

Plainly and simply, Count 2 makes no reference to Section 371, a conspiracy statute, but due process requires notice to the defendants even to court legislated murder in the first degree

as well as statutory murder enacted by the legislature and executive.

The confusion and impropriety of this charge was vividly shown when the jury during its deliberations wrote a note to the court (2242). The following proceedings occurred - the Court read the note from the jury as follows:

> "Under the aiding and abetting theory, does a man to be found guilty of murder have to have knowledge of the specific crime involved, specifically, a truck to be robbed."

The Court answered that question (2250) as follows:

> "A defendant may be found guilty of murder in this case if you find beyond a reasonable doubt that he aided and abetted the commission of the robbery with knowledge that a truck was to be robbed; it is not necessary that he know the specific type of truck. Thus, he may be found guilty even though he did not know that a U.S. mail truck was to be robbed."

This was in direct contradiction to his charge contained on Page 2188 - Line 19: "Fifth, that defendants knowingly and wilfully aided and abetted Myers in the attempted robbery of the mail truck."

It is also contradictory to the second element (2188) which was that at the time of the killing the jury had to find that Hickey was engaged in the performance of his official duties as an employee of the U.S. Postal Service. Those official duties were as convoy for a mail truck.

It was obvious that the court had confused the conspiracy run-wild alternate theory expounded with the requirements of Sections 1111 and 1114 and 2 and 2114 under which defendants were charged.

The evidence in this case sustained the requirement that murder in the second degree be charged because, in essence, the elements of Murder 1 and 2 are the same with the possible exception of the additional charge of premeditation for Murder 1, which incidentally was not charged by the court.

The evidence established that a .38 caliber bullet was shot from a .38 caliber revolver by Myers, struck and passed through Hickey and hit Lawrence in the neck. The testimony of both Myers and Mann who were on the scene, was that the shooting and killing were accidental, unintended and testimony by Myer established that the guard who was supposed to be in on the robbery, panicked and the gun went off accidently.

If the act of killing is done unlawfully and with malice aforethought or without the premeditated intent wilfully to take a human life, then the offense is murder in the second degree. (Fed. Jury Practice and Instructions, 2nd Edition - Devitt-Blackmar, 43.11; Fisher v. United States, 328 U.S. 463; reh. denied 329 U.S. 818; Faust v. North Carolina, 307 F 2d 869; Hansborough v. United States, 308 F. 2d 645 (1961); Lee v. United States, 112 F. 2d 46 (1940); Beardslee v. United States, 387 F. 2d 280.)

When consistent with the facts found by the jury from the evidence in the case and with the law as given in the instructions of the court, it is permissible for the jury to find the accused guilty of any lesser offense which is necessarily included in the crime charged in the indictment.

The crime of murder in the first degree which is charged in Count 2 of this case necessarily includes the lesser offenses of murder in the second degree and manslaughter.

Where the charge is "felony murder", it is proper to submit second degree murder as a lesser included offense. (Fuller v. U.S., 407 F.2d, 1199; Federal Jury Practice and Instructions, 2nd Ed. Devitt-Blackmar; Berra V. United States, 351 U.S. 131; Belton v. United States, 382 F. 2d 150 (1967).

Where a jury has reasonable doubt as to whether murder was in the first or second degree the jury should, of course, give the accused the benefit of that doubt and return a verdict of guilty of the lesser included offense. (Federal Jury Practice and Instructions, 2nd Ed. Sect. 43.13; Kitchen v. United States 205 F. 2d 720 (1953); Lee v. United States, 112 F.2d 46 (1940).

Voluntary manslaughter is the unlawful killing of a human being without malice upon a sudden quarrel or heat of passion. Upon the evidence in this case, the court should have charged voluntary manslaughter.

Manslaughter differs from murder in that there is no element of malice aforethought. The court instructed the jury that they could have inferred malice and thus conversely not infer malice. If they did not infer malice, then the jury was entitled on the findings in this case to bring in a verdict of manslaughter rather than to acquit the defendants or find them guilty of murder in the first degree. (federal Jury Practice and Instructions,

2nd Ed. Devitt-Blackmar, sec. 43.14, Sims v. United States, 405 F. 2d 1381; Beardslee v. United States, 387 F. 2d 280).

The courts failure to charge murder second and manslaughter contradicted its own reasoning and fact finding through earlier proceedings involving defendants in this case. On September 17, 1973, defendants, Chester Crawford, Geoffrey Mann and Terrence Dewey Myers, pleaded guilty to murder in the second degree which the court accepted under the allocution and on its own findings that murder second was a lesser included offense of Count 2 of the indictment. This was evidenced by the court throughout the transcripts of September 17, 1973 on pages 2826, 2830-2831, and is specifically written out in the judgments against the defendants, Myers and Mann who have been sentenced and will also be written out against Chester Crawford when and if he is sentenced (2816,2818).

On page 2820 of the record, the court said:

> "We have sufficient allocution from what Mr. Crawford has told us. He would be guilty of murder in the second degree because he was part of a conspiracy and the murder as a result took place." (2820).

It was not the law that compelled the court to erroneously limit the defendants to a charge of murder in the first degree. It was conditioned by the plea bargaining process in this case which inherently required that if some defendants, to wit: Myers, Mann and Chester Crawford pleaded guilty to murder in the second degree and testify, then axiomatically under the rules, the other defendants, failing to cooperate, must be punished more severely--not for their crimes but for bucking the system.

The Court erred in its charge on Count 3. It listed four elements for the jury to find in order to convict:

> (1) that Crawford Lawrence had lawful charge of the mail;
>
> (2) that Geoffrey Mann OR Terrence Myers intended to rob Crawford Lawrence of such mail;
>
> (3) that in attempting to effect such robbery, EITHER Geoffrey Mann OR Terrence Myers wounded Crawford Lawrence or put his life in jeopardy by use of a dangerous weapon_____;
>
> (4) that the defendants knowingly and wilfully aided OR abetted Myers or Mann in the attempted robbery.

This instruction did not conform to the material elements which the court earlier spelled out as to the contents of Count 3. Six words were omitted from the third element. These words were: "to wit, a .32 caliber revolver". These words were contained in Count 3 of the indictment which charged that the defendants:

> " did wound AND put in jeopardy the life of the said Crawford Lawrence by use of a dangerous weapon, to wit: a .32 caliber revolver".

Neither the court nor the prosecution can amend the indictment. That can only be done by the grand jury. In fact, the prosecution did not even attempt to amend the indictment. The evidence in the case established that Lawrence was assaulted and wounded with a .38 caliber revolver and that he was not wounded by a .32 caliber revolver.

While the charge is artfully drawn, the third element is inherently defective. Count 3 of the statute required the defendants to wound AND put in jeopardy the life of Crawford Lawrence. There was no evidence in the record to sustain a finding that GEOFFREY MANN WOUNDED Crawford Lawrence. From the charge the jury could

find that Geoffrey Mann wounded Lawrence and Terrence Myers put his life in jeopardy by use of a dangerous weapon, but this finding could not be supported by the factual evidence.

Concerning Count 3, the Court went on to instruct the jury (2196) that the alternate theory which he enunciated under Count 2 was similarly applicable to this count as to the defendants. The court did not go on to explain that the defendants were not charged with murder under Count 3 as they were in Count 2, nor did the Court charge the criteria for finding a reasonably forseeable act.

The sparsity of the alternate theory explained by the Court under Count 3 could permit the jury to believe that it could find the defendants guilty of murder under Count 3. It could also permit them to find that any assault committed by any named co-conspirator at any time during the conspiracy,including the Secaucus hold up on 3/22/73,would be grounds for finding the defendants guilty under Count 3. Defendants were certainly entitled to have the Citation of statute or judge-made law cited in the count so as to be in a position to defend against it. From the vague alternate theory charged under Count 3, it would be possible for the jury to find that Myers assaulted DiGiorgio on 3/22/73 in Secaucus and as a result the defendants could be guilty under Count 3 of the indictment or under Count 2 of the indictment; that is, shooting of a post office employee driving a mail truck andkilling a post office guard on a mail truck.

From the alternate charge theories directed by the Court, the defendants could be held to have malice and knowledge, notwithstanding that Myers, the actual admitted killer, did not have the malice aforethought and premeditation required for murder in the first degree or required intent under Count 3.

The court also failed to instruct the jury that it could find the lesser included offense under Section 2114, as it found in its allocution of the defendant, Turner on September 21, 1973 and as appears in his Judgment (258).

The court instructed the jury (2203) that Maria Vasquez, Harry Johnson and Larry Dalia did not testify on the trial and that these persons are not under the control of either the government or the defendants. This charge was clearly erroneous especially in the case of Harry Johnson where the government had him in New York during the trial but did not advise defense counsel; and where this co-defendant who had made a deal with the government to plead to a lesser count was eager to testify as a prosecution witness. The government also had the ability under 6002 to grant "use" immunity to Harry Johnson which power was not available to defendants.

In view of the fact that the only evidence which could allow the jury to find the defendants guilty was the testimony of accomplices, informers and felons who were previously co-defendants and who pleaded guilty with hopes for leniency in sentencing .

It was necessary for the court to charge defendant's Request

No. 1, 4, 14, 16 and 19 (204).

On Page 2183 of the transcript, the Judge says to the jury:

> "I want to advise you that I have admitted into evidence without limitation, those portions of the testimony which you heard me state during the trial were admitted with the limits "subject to connection" All such evidence may be considered to the effect that you give it credence in weighing the guilt or innocence of a defendant."

Does not this mean that he feels that all of the evidence is connected, or is he letting the jury decide whether it was connected? It is error and prejudical.

The errors in the charge were prejudical to the defendants and require a new trial.

POINT II

THE THIRD COUNT OF THE INDICTMENT MUST BE DISMISSED AS A MATTER OF LAW

Count Three of both indictments, pertaining to the respective defendants, reads as follows:

> "The Grand Jury further charges:
> On or about the 5th day of April, 1973, in the Southern District of New York THOMAS JOSEPH CARROLL, JOHN TURNER, a/k/a "Jack", VINCENT MC CLUSKEY, a/k/a "Mike", ROBERT E. RIPPY, a/k/a "Ripp", CHESTER CRAWFORD, PAUL CRAWFORD, TERRENCE DEWEY MYERS and GEOFFREY MATTHEWS MANN, the defendants, unlawfully, wilfully and knowingly, did assault a person, to wit, Crawford Lawrence, having lawful charge, control and custody of mail matter and of property of the United States, with intent to rob, steal and purloin such mail matter and property of the United States, and in effecting and attempting to effect such robbery, did wound and put in jeopardy the life of the said Crawford Lawrence by use of a dangerous weapon, to wit, a .32 revolver.
> (Sections 2114 and 2, Title 18, United States Code.)

The Government's Bill of Particulars claim two weapons were used against Crawford Lawrence - a .38 caliber hand gun and a .32 caliber hand gun.

The only credible evidence in the record concerning the wounding of Lawrence was that he was struck in the neck while seated in the truck when one shot was fired.

(380. DIRECT OF LAWRENCE):

"Q. After the truck stopped abruptly, how much time passed before you heard the shot?
A. Seconds. It happened like -- it happened so fast, I--
Q. And when you heard the shot, did you feel anything?
A. I felt a sting in my neck and that's when I turned to the right.

Q. And what was that sting on your neck, if you know?
A. They said the bullet grazed me in the neck.
Q. Did you subsequently have the wound treated?
A. Yes, I did."

He was struck at the right rear of the neck with the same bullet which had gone through Hickey (380,398,414).

(398. DIRECT AND CROSS OF LAWRENCE):

"Q. And your best recollection now is that there was absolutely no talk at all before the shot was fired?
A. No.
Q. On the right side? At the point that you felt the sting which was a shot that hit you in the back of the neck--
A. Right.
Q. --Mr. Hickey was quite close to you?
A. Yes.
Q. And you know now, do you not, that the bullet that penetrated Mr. Hickey's skull and brain was the same bullet that struck you?
A. Yes.
Q. In other words, it went right through his head, his brain, and hit you?
A. Yes, sir.
Q. Now, there came a time when you were ordered out of the truck?
A. Yes, there was."

This shot was fired from a .38 caliber pistol used by Myers.

(405. CROSS OF LAWRENCE):

"Q. When you say it was a large gun, would you attempt to describe it, if you could?
A. Yes, it was about the size -- I guess it's a .38 -- about that big (indicating).
Q. A .38?
A. Yes."

(1179. CROSS OF MYERS):

"Q. Mr. Myers, would you tell the Court and jury what type of weapon you had on April 5th?
A. A .38.
Q. A .38. Is that the type of weapon that can be fired both from a cocked position and from an uncocked position?
A. Yes.

Q. Would that be a double-action revolver?
A. The term is that, yes."

(1366-1367. DIRECT EXAMINATION MANN):

"Q. After you got out of the car, what did you do?
A. Well, we stood, because there's a parking lot for the hospital right here, and we stood there, wasting some time. Then, say five minutes, saw a van pull around, with the postal truck following it. That's when I proceeded across the street to get on the driver's side.
Q. Please try to keep your voice up. I can't hear you.
A. Went across the street to the driver's side.
So, the van stopped, and a few seconds, the driver looked over to the guard side, that's when I proceeded to the driver's side of the truck, and it was open -- reaching opening the door and the door opened at the same time and the driver got out of the truck. That's when I saw the guard slumped. So I grabbed the driver by the arm and went to reach for the van, but at that time the van was leaving. So when I tried to let go of the drive, to try to catch up to the van, to knock on it so he would stop, but that didn't work, so the driver started to run. That's when I fired at him. And then --"

The .38 caliber bullet was found directly in back of the position where Lawrence was seated in the truck.

(1978. CROSS OF KIEVIT):

"Q. Incidentally, in your investigation, did you ever ascertain the caliber of the bullet that killed the mail guard?
A. Yes sir, I believe it was a .38 caliber.
Q. Did you ever find the bullet?
A. Yes, sir, I believe it was located in the back of his seat, behind the driver.
Q. And what did you do with it?
A. It was sent to our laboratory, sir, for analysis.
Q. Did you get a laboratory report on it?
A. Yes, sir, we did."

This bullet that killed Hickey and wounded Lawrence was not fired by Mann.

(2831. ON PLEA OF MANN):

"THE COURT: Did you shoot William Hickey?
DEFENDANT MANN: No, sir.
THE COURT: Do you know that William Hickey was killed by

Mr. Myers during the course of that robbery?
DEFENDANT MANN: Yes, sir."

Myers fired one .38 caliber bullet from a .38 caliber gun which passed through and killed Hickey and struck Lawrence.

The credible evidence could establish that defendant Mann fired several shots at Lawrence while he was running away from the scene of the attempted robbery (382). No where was the size of the bullets, nor the type of gun that Mann used established by any evidence in the record, and more importantly, the only evidence in the record showed that none of the bullets fired by Mann struck Lawrence. Two of them went through his jacket, but: "fortunately these didn't strike." (401, 402). This supports the prosecution's case as propounded during the opening (329, 330) when the .38 caliber bullet shot by Terrence Myers both killed Hickey and wounded Lawrence:

(329-330. PROSECUTOR'S OPENING):

> "At that point, Geoffrey Mann took the guard -- rather, I'm sorry, the driver, Crawford Lawrence out of mail truck, and attempted to put him in the back of the van as was planned. However, Crawford Lawrence ran down William Street. Mr. Mann stationed himself in the intersection of William and Beekman Streets and fired four or five shots after Crawford Lawrence as he ran down the street. Fortunately, he did not hit Crawford Lawrence and he will be here to testify as to the events that happened. He was, however, wounded by the same bullet that killed Hickey and you will find that his clothing was pierced by bullets as he ran down the street."

The prosecutor aware of the deficiency of his case on Count 3 of the indictment meticulously avoided any reference in his opening statement to the caliber of gun which wounded Lawrence.

The only credible evidence in the record concerning a .32 caliber gun was that Mann was arrested on 3/21/73 in New Jersey and that the gun had been confiscated (2657).

There is no evidence in the record to permit the jury to infer and find that Lawrence was "WOUNDED BY THE USE OF A DANGEROUS WEAPON, TO WIT: A .32 CALIBER REVOLVER."

The credible evidence supports a finding that he was wounded by the .38 caliber revolver used by Myers and also supports a finding that he was assaulted BUT NOT WOUNDED, by any bullets from an unknown caliber gun used by Mann.

There is no evidence to support a finding that either Myers or Mann WOUNDED Lawrence as charged in the indictment: "BY USE OF A DANGEROUS WEAPON, TO WIT: A .32 CALIBER REVOLVER".

The defendants are entitled to defend against the material allegations alleged in the indictment and base their defense on those facts and information supplied in a Bill of Particulars and Discovery.

Title 18, Fed. Rules of Criminal Procedure Rule 7 states the defendants are entitled to be tried under an indictment handed up by the Grand Jury which shall be signed by the attorney for the Government. The indictment shall state, for each count, the official or customary citation of the statute, rule, regulation or other provision of law which defendants violated; (c) makes provision that an error or omission of a CITATION, required by (C-(1), is not grounds for reversal of a conviction if the error

or omission did not mislead the defendant to his prejudice. (D) authorizes the court to strike surplusage from the indictment or information on motion of the defendant. Provision is made for the court to permit an information, not indictment, to be amended if the substantial rights of the defendants are no prejudiced.

Rule 7 no where authorizes the Government or Court to amend or vary the "INDICTMENT" except for the striking of surplusage and then only ON MOTION OF THE DEFENDANT (d).

The only harmless error either by commission or omission which the rule provides shall not be ground for reversal of a conviction is error in the CITATION of statute rule, regulation or provision of law and then only if such "CITATION" error did not mislead the defendants to his prejudice (C) (3).

The indictment by a Grand Jury cannot be amended by the Court in which it is filed or by the prosecuting attorney without being resubmitted to the Grand Jury and cannot be amended physically or by inference. (Fifth Amendment U.S. Constitution; See Ex Parte Bain; 121 U.S. 1).

To the same effect, see U.S. v. Ortiz; 324 Fed. Supp. 417, where the Court ruled "a party can only be tried upon the indictment as found by the grand jury and especially upon all its language found in the charging part of that instrument." It also ruled:

> "Hence, it is clear that this Court may neither physically amend the indictment to conform to the evidence at trial,

nor permit the defendant to be convicted on the basis of evidence of knowledge not charged in the indictment."

See also Fed. Practice and Procedure by Charles Alan Wright, on Fed. Rules of Cr. Proc. Vol. 1, Section 127, as follows:

> "If it lies within the province of a court to change the charging part of an indictment to suit its own notions of what it ought to have been or what the Grand Jury would probably have made it if their attention had been called to suggested charges, the great importance which the common law attaches to an indictment by a Grand Jury, as a prerequisite to a prisoner's trial for a crime, and without which the Constitution says 'no person shall be held to answer', may be frittered away until its value is almost destroyed".

Neither the prosecutor nor the court during or at the end of the trial attempted to amend the indictment. It, therefore, should follow that Count Three of the Indictment should be dismissed.

POINT III

THE COURT ERRED IN ADMITTING TESTIMONY AND DOCUMENTS WHICH WERE PREJUDICIAL TO THE DEFENDANTS AND DEPRIVED THEM OF A FAIR TRIAL

Prosecution, in opening, said: "The Government will show you to prove the malice and incredible malice that these men had, a test, an armed robbery, on the 22nd of March outside the Plaza National Bank in Secaucus, New Jersey, in an effort not only to get the money from the men they robbed, but to try out Myers and Mann to see if they were good enough to try the mail truck job. They were" (510).

"That on the 26th Mike McCloskey stole a car in New Jersey from a car rental place for the purpose of using it in this event, and towards the end of that week that car was left in Pennsylvania, where eight of the men went on a frolic not directly related to this case, again" (333).

"On the 29th or 30th of March, Tommy Carroll stole the very van that was used on April 5, 1973, from the Schwartz Yarn Company in, I believe, North Bergen, New Jersey." (333)

The above were not overt acts claimed in the conspiracy count.

The overt acts spelled out in the indictment are: (36)

"1. On or about the 20th day of March, 1973, CHESTER CRAWFORD, PAUL CRAWFORD and TERRENCE DEWEY MYERS went to the vicinity of Wall Street, New York, New York,

2. On or about the 22nd day of March, 1973, CHESTER CRAWFORD met with THOMAS JOSEPH CARROLL and VINCENT McCLUSKEY, a/k/a "MIKE" in the vicinity of Fulton Street, New York, New York.

3. On or about the 5th day of April, 1973, THOMAS JOSEPH CARROLL, JOHN TURNER, a/k/a "Jack", VINCENT McCLUSKEY, a/k/a "Mike", CHESTER CRAWFORD, TERRENCE DEWEY MYERS and GEOFFREY MATTHEWS MANN, met at Katz's Delicatessen, Houston Street, New York, New York."

No where else in the indictment are the defendants charged with robbing a payroll, stealing a car or stealing a truck.

Defendants Demand for Bill of Particulars, requests:

1. Identify each overt act not enumerated in the indictment concerning which the government intends to offer". (2327)

The Court denied this request and it was not furnished in the discovery.

In an application in support of an order signed by this court on December 11, 1973, granting limited immunity to Chester Crawford, Paul J. Curran, Esq., U.S. Attorney, indicated that the government sought to elicit testimony as to the armed robbery of Rocco Di Georgio outside the Plaza National Bank in Seacaucus, New Jersey on March 22, 1973. (138)

By written motion submitted on December 12, 1973, defense counsel moved for an order preventing the admission into evidence by the prosecution of any other criminal acts of the accused, and more particularly, preventing the introduction into evidence in this case of any and all facts and testimony relating to an alleged armed robbery of one Rocco Di Georgio outside the Plaza National Bank in Secaucus, New Jersey on March 22, 1973.

The Court denied the motion and allowed testimony of this

uncharged, unrelated and serious crime to be given to the jury as evidence proving defendants "incredible" malice. (524) This written motion was followed with oral discussions on the point between defense counsel and the Court during prosecutions opening, as follows:

> (Page 335/336) "MR. MARTIN: If Your Honor please, from the opening of the United States Attorney, I think it is highly inflammatory, for one thing, because he has named at least seven or eight crimes that are totally unrelated to this. He is bringing this in solely and only for the purpose of prejudicing the defendants, and even more important, and I think of prime importance to this, a lot of this stuff which he has just come out with now has not been set forth in an indictment, hasn't been set forth in a bill of particulars. We are not even in a position to set up a defense or know where it is coming from. I think it is grossly unfair. He is evidently going to introduce acts that would constitute crimes without even charging the defendants with.
>
> We had no information at all about any of this, not even a hint that these specific things were coming in. He is bringing in a full-blown bank robbery that we weren't even aware of. I think it is very unfair to the defendants, very highly prejudicial . I don't think this case can be tried that way with this information if this information is put in.
>
> THE COURT: Your exception is noted.
>
> MR. MARTIN: At this point I am moving to dismiss it and registering my protest on the ground we are not properly prepared and can't even move to debate it ...
>
> THE COURT: Denied".

The government has the obligation to be fair to the defense counsel as well as itself. The event of 3/22 should have been listed as overt acts or been supplied to defense counsel in discovery to allow adequate preparation and freedom from surprise.

Besides the Count 1 conspiracy charges, the complaint accused the defendants of murder in the first degree as the second count in the indictment and assault in the first degree

in Count 3 of the indictment.

Count 2 of the indictment, under Section 1111 states:

> a. "Murder is the unlawful killing of a human being with malice aforethought".

From the opening statement and with each substantative witness the prosecutor over and over again, drove home testimony pertaining to the events of March 22, 1973. He requested and was given immunity for five felon accomplices only on the events of March 22 and they repeated these events over and over again.

The immunity grant, recognized that 3/22 was an unconnected event and not a part of Count 1.

The witnesses granted the immunity, had all previously made arrangements with the government to plead to lesser included offenses of the counts charged or to conspiracy. These pleas were accepted with the understanding that they would testify for the government on the matters contained in the indictment, (2647/2648) waiving their privilege on those matters. (872, 873) There was no need to grant immunity except for matters outside the scope of the indictment.

Witness Cafasso, identified government's Exhibit 30 (2584) as a stolen car report. Over objection it was admitted subject to connection. It described a blue step van reported stolen on 4/2/73, sometime between 5 PM on 3/30/73 and 7:00 on 4/2/73. The evidence adduced on trial failed to establish this car as the vehicle allegedly used on 4/5/73. The evidence should not have been admitted, but once in should have been stricken when

not connected.

Turner testified that two defendants stole a truck on 3/29/73 (1750). Exhibit 30 set 5 PM on 3/30/73 as the earliest time for the theft. Schwartz, who owned the van, said their trucks had not been painted over (1860).

Holder testified, over objection, that a Chevrolet Station Wagon was stolen from her on 3/30/73. This car was not connected by the evidence as the station wagon used by the defendants; the serial number was not established; and the dates varied.

It was error to permit testimony and physicial evidence establishing the car and truck thefts subject to connection and even more erroneous not to strike it.

The government has a duty to present its case fairly. Defendants cannot have a fair trial if they have been denied the opportunity to discover evidence or information crucial to their defense.

The rule is universal that the prosecution may not resort to the introduction of any evidence, the purpose of which is to establish defendant's evil character or specific criminal acts other than those charged in the indictment. (People v. Zackowitz; 254 NY 192; Michelson v. U.S.; 335 U.S. 469).

The three unrelated criminal acts; the robbery in Secaucus, the stealing of a truck and the stealing of a car were offered without notice to the defendants and were not listed as overt acts of the conspiracy and were not involved in any counts of the indictment,

they were admitted to establish defendants' malice as required under Count 2.

WIGMORE has marshalled the varied reasons for exclusion of prior criminal conduct and reduced them to three:

> "(1) The overstrong tendency to believe the defendant guilty of the charge merely because he is a likely person to do such acts;
>
> (2) the tendency to condemn, not because he is believed guilty of the present charge, but because he has escaped unpunished from other offenses;
>
> (3) The injustice of attacking one necessarily unprepared to demonstrate the attacking evidence is fabricated ... (J. Wigmore, Evidence, Section 194, pp. 646, 648 (3d Ed.). Each and all of these factors are present in defendants' case. (U.S. v. Baum; 2nd Cir. 1973, Docket Nos. 72-1966, 72-134).

Suppression by government should be discouraged and disclosure promoted in order to promote the proper administration of criminal justice. (Dennis v. United States; 384 U.S. 855, 870, 86 S.Ct. 1840, 16 L. Ed.2d 973 (1966); United States v. Youngblood; 379 F. 2d 365 (2d Cir. 1967).

Wigmore on Evidence cited above claims:

> "that the rule requiring exclusion of other criminal acts for some other purpose than to show a probability that he committed the crime on trial because he is a man of criminal character, is a matter of social policy because the jury is more likely to give it more weight than it deserves on its probative value and might decide that the defendant deserved to be punished because of the past crimes without regard to whether he is guilty of the crime currently charged."

These acts, introduced during trial, were not "similar acts". Any precautionary statement by the court to the jury is meaningless. (Krulewitch v. U.S.; 336 U.S. 440, 453; Kalven & Zeisel, The American Jury, 125-130, 177-180).

The consideration of these acts by the jury place the defendants in an untenable position. They are faced with the dilemma of attempting to rebut the extra criminal acts not charged in the indictment, without being able to remain silent under the Fifth Amendment of the U.S. Constitution.

The practice in this case violated defendants' constitutional rights to a fair trial under the Fifth Amendment of the U.S. Constitution and required that the judgment entered on January 25, 1974 be vacated.

The prosecution, over objection, introduced oral admissions of a co-defendant Rippy (1220) to the effect that he had admitted participating in the acts in the conspiracy. Oral admissions were entered over objections against co-defendant V. McCloskey (1960) to the effect that he had discussed disposition of the merchandise to be obtained from the truck to be robbed.

When the first admission was offered into evidence, a motion was made for a mistrial or in the alternative for a severance (3088) which the court denied. The jury was instructed that such evidence was admissible only against the defendants against whom it was admitted.

Under Rule 14, Fed. R. Crim. P., which was amended in 1966, the comment to the rule states:

> "That a defendant may be prejudiced by the admissions in evidence against a co-defendant of a statement or confession made by that co-defendant. Limiting instructions to the jury may not, in fact, erase the prejudice".

Judge Learned Hand's statement in Nash v. U.S.; 54 F2d 1006,

more appropriately describes that instruction is a

> "recommendation to the jury of a mental gymnastic which is beyond not only their powers but anybody else". (Sims v. U.S.; 405 F2d 1381 to 1384; Bruton v. U.S.; 391 U.S. 123; U.S. v. Morales, 477 F2d 1309).

Other errors of evidence during the trial, were:

Over objection, Government Exhibits 3 and 3A, an employment record of William Hickey, was admitted into evidence (2535). The card contains in distinguishing script, "gun shot on job".

These words contained on a government record when evaluated by a jury, outweighed in prejudice to the defendants any probative value to the prosecution.

Remote corroborative evidence consisting of motel registrations on varying dates; on one, a name R. Smith was given. Witnesses DiGiorgio (1311), Duda (1325), Dunning (1339), Hand (1393), Snowden (1403), Cafasso (1413), Helvey (1433), Dietrich (1437), Sagliano (1567), Del Principi (1584), Kennerson (1591), Wall (1695), and Schwartz (1816) appeared before the jury and who by and large presented official looking documents from banks, cancelled checks, signature cards, telephone company records of bills and installations for people unrelated and having no ties to the defendants, and marked and initialed in handwriting, with initials of the defendants on the bills alongside calls, official reports of stolen vehicles which were not connected to vehicles allegedly used by the defendants; contracts; remote bills as late as 9/73; massive lot numbers and manifests and declarations. These exhibits introduced by the government cover

pages 2532 through 2630 and however remote, innocuous and irrelevant, were oppressive by their physical weight.

Conversations with defendant Rippy concerning his alleged participation in the conspiracy for which he was later acquitted were permitted into the record subject to connection but were not stricken on motion at the end of the People's case. The Court refused to permit the defendant to introduce certain pictures and refused to permit the defendant to have the photographer appear in Court to qualify as an expert in order that the pictures of the actual scenes of the crimes as testified to by the prosecution witnesses could be shown to the jury. (1073) Exhibit E (2649) showed there is no stop sign at the intersection of the alleged hold up. The prosecutions' witness testified that the mail truck came to a stop at a stop sign at an intersection. In fact, the picture shows that the intersection is a dead end termination of William Street.

The Postal Inspector packaging the case (1942) testified, despite his earlier presence in court during the trial; (1941) he summarized for the jury telephone calls, during the alleged incidents of the indictment and subsequently. The calls were from telephones unrelated to defendants. (1943, 1944, 1948, 1949 and 1952). He then testified, using notes not produced for defense, to an alleged oral statement made by one defendant on 11/23/73 without counsel present or active (1970).

POINT IV

DEFENDANT, VINCENT McCLOSKEY, WAS DEPRIVED OF LEGAL COUNSEL; TO REMAIN SILENT; AND BY RULINGS DURING THE PROCEEDINGS, WHICH DEPRIVED HIM OF DUE PROCESS OF LAW AND HIS CONSTITUTIONAL RIGHTS

DEFENDANT DEPRIVED OF LEGAL COUNSEL

In all criminal prosecutions the accused shall enjoy the right to have the assistance of counsel for his defense. (Sixth Amendment, U.S. Constitution).

This provision, when coupled with the Fifth Amendment privilege against self-incrimination, has been held to mean that a defendant has the right to counsel during every critical stage of the proceedings. (Miranda v. Arizona, 384 U.S. 436).

The right certainly attaches after an accused has been formally charged with an offense and when an adversary criminal prosecution is pending against him. (Kirby v. Illinois, 406 U.S. 682). This right continues throughout the prosecution (U.S. v. Ash, 37 L.Ed.2d 619, 1973). It is so important that counsel must be provided in Federal Courts. (Fed. Rules Cr. Proc. Rule 44(a). Certain errors may be so fundamental that they deprive the accused of a fair trial and due process of law. (Pate v. Robinson, 383 U.S. 375).

The first of the indictments herein was handed up on June 14, 1973 and a superseding indictment filed on September 11, 1973.

Donald Hopper appeared for defendant on June 25, 1973 and entered a plea of "not guilty"(2690). On the same day Edward S. Panzer appeared and conferred with co-defendant, Robert Rippy (2682). Rippy was tried with defendant McCloskey. Panzer was subsequently substituted by other counsel for Rippy.

In August, Jay Goldberg was retained as trial counsel to work with Donald Hopper as co-counsel (2876). $20,000 was paid by the defendant for counsel of his own choosing, with $5,000. to Hopper and $15,000. to Goldberg (275).

On September 17, 1973 the case was called and adjourned indefinitely because of wire tap questions; several co-defendants took pleas; the trial was severed for another co-defendant and the Court, on its own motion, ordered defendant McCloskey to Springfield, Mo. for a detailed competency examination (2840), where he arrived on October 18, 1973, underwent examinations on November 13th and 14th, 1973 and was returned to New York on November 19, 1973 (2889).

During his absence, Judge Metzner relieved Hopper as co-counsel and authorized him to represent co-defendant William McCloskey, without consultation with defendant and while he was incarcerated in a mental institution undergoing competency tests (2876 - Minutes dated November 7, 1973).

On November 7, 1973 Judge Metzner informed defendant's remaining counsel, Jay Goldberg, of trial for November 26, indicating that counsel should get somebody else to represent defendant because the case could not be put over (2863). Goldberg was on trial in another case and there was a question as to how long that other trial would last with some indication that it would go past December 10, 1973. Goldberg said defendant had paid him a fee which he would not return and he would not try to secure other counsel (2865).

This was while defendant was incarcerated in Springfield, Mo. and

prior to the time when psychiatric examinations and evaluations had been made.(80/83) Judge Metzner instructed Goldberg that defendant would have to get another lawyer and took the position his problem was giving sufficient notice of the trial and Goldberg's problems, meaning the Bar Association and the rest, were not his (2878).

Judge Metzner stated that December 10 was the latest the case could start in order to finish before Christmas to insure that a jury was not pressured and angry about being brought back between Christmas and New Years (2882). Again, on November 13, 1973, Judge Metzner advised that defendant would have to get another attorney and Goldberg responded: "So be it." (2886).

Defendant was not returned from Springfield, Mo. until November 19, 1973 after his examinations (80/83). The day of defendant's return during a lunch recess in the case on which he was on trial, Goldberg interviewed the defendant and told him that he would have to get another lawyer, and the defendant asked him where he could get one (2891). Judge Metzner then advised the defendant to get another lawyer and directed Goldberg to contact the family since the defendant who was in jail could not do so.(2913). Goldberg said that he would not return the fee paid by the defendant (2914).

When discussing the results of defendant not having counsel of his own choosing, Judge Metzner said that any man who faces going to jail loses liberty and that if it is 10 to 15 years under a narcotics act, why not (2915), and indicated that he must know by the following day if the family was getting new counsel (2919)

A week later on November 27, 1973 Judge Metzner in open court

appointed Edward Panzer to represent the defendant (2921) and Panzer, who had previously been appointed by Judge Metzner to represent the co-defendant, Rippy, subsequently received fees as counsel for defendant McCloskey (252

Judge Metzner had on November 23, 1973 informally contacted Panzer, a former Legal Aid Assistant, as to his availability to represent Mr. McCloskey (2767 - 2768 - Minutes of December 8, 1973). Panzer was appointed on the representation that the McCloskey family had no funds to hire an attorney (2766-2768) although it was obvious from earlier bail proceedings that defendant's family could raise $50,000 and had in fact paid $5,000 to Hopper whom Judge Metzner permitted to be relieved and $15,000 to trial counsel Goldberg who was retained to handle the trial and who was unilaterally relieved by the Court. There was no prior consultation with the defendant regarding his willingness to release his paid counsel and no arrangements were made by the Court or by the lawyers, as officers of the Court, to allocate all or some of the $20,000 counsel fees to the defendant for use in obtaining new counsel. This - despite the fact that defendant was charged in Count 2 with murder and a mandatory life sentence and Count 3 with assault carrying a mandatory 25-year sentence.

On December 3, 1973 John F. Martin requested to meet with defendant in response to the family's request. Judge Metzner made the arrangements but reiterated that he was going to trial on December 10, 1973 no matter what happened (2926).

On December 4, 1973 Martin substituted for Panzer with instructions to proceed to trial on December 10, 1973 with requests to charge and Memorandum of Law filed by December 7, 1973 (2756 -2757). December 5

and 6, 1973 were spent by new defense counsel attempting to obtain the file. Panzer had no file, except a C.J.A. order appointing him as attorney and authorizing payment of his fees by the United States Government. Panzer's predecessor had a few documents which were not handed over for two days and only after payment was made for duplicating costs.(278). Letters were written December 6 and 7 to the Prosecutor and Court requesting help in getting information and documents to prepare for the trial (248,253,278,3084). Motions dated December 6 and 7 for a severance to permit the new counsel to prepare for trial and for multiple relief including information and requests as to information, steps preparatory to trial were made (279).

Defendant was interviewed on December 7 when Judge Metzner ordered counsel to the courthouse where several hours were spent and counsel was ordered to appear before the Judge on Saturday, December 8, where the written motions described above were argued although made returnable on December 10 (269-279). Defendant was incarcerated and unavailable to counsel during the weekend, December 8, December 9 (279) and until December 8 counsel did not have a copy of the superseding indictment to read the counts and citations of law charged against defendant.

The transcript of the minutes on the argument of the motions for December 8 covers pages 2760 through 2805. All motions were denied.

There are four dockets bearing four separate indictments and numbers (2257 2272 2504 3036) which were new to defense counsel. A study of those dockets show that most documents were not filed until after trial commenced and no transcripts were available, except for minutes from September 17, 1973 which counsel first received on

December 8, 1973.

Judge Metzner refused to sever the defendant or adjourn the trial to enable defense counsel, who was retained four days previously, to prepare for trial, despite the fact that the defendant had not even pleaded to the indictment (Fed. Rules Cr. Proc. Rule 10) and that no written motions of any type had been made on the superseding indictment under which the defendant proceeded to trial two days later.

A properly prepared defense necessitates diverse and multiple chores - interviews with witnesses, a review and preparation of documents and motions, visits to scene of alleged incidents; interviews with defendant's family and friends, interviews with the defendant and his witnesses as to his whereabouts and condition on the days alleged in the complaint; investigations into physical evidence, researching of the law, preparation of factual statements and witness statements, preparation of trial memoranda, research in library, and mapping of trial strategy and study of same from prosecution and defendant's posture, consulting with three co-counsel appointed to conduct the trial and six-co-counsel representing defendants who were not on trial, moving for pre-trial conferences in accordance with Rule 17.1 of Fed. Rules of Cr. Proc., research and inquiring into collateral matters and background witnesses and co-defendants.

The foregoing activities which do not encompass the entire gamut required from professional counsel would take at least two months to properly prepare instead of the five days allocated by the Court. Judge Metzner permitted defendant's first counsel to switch defendants, unilaterally relieved co-counsel, substituted the government paid

third counsel for the defendant and compelled new defense counsel to proceed to trial five days after being retained.

These actions deprived defendant of an adequate legal representation causing him inherent prejudice calling for a new trial.

DEFENDANT DENIED MIRANDA HEARING

Defendant moved for an order suppressing any written and oral statements made by defendant to the government's representatives during November 1973.

Without defense counsel, several government attorneys and postal inspectors spoke to defendant in prison and in the government's office which culminated on November 26, 1973 with a document being signed (244)which was dictated, typed and prepared by the prosecutor and which had not been read by the lame-duck retiring defense counsel who was officially substitued by a court appointed attorney on the morning of November 27, 1973. This occured within several days after defendant's return from a hospital in Springfield, Mo. where he was injected with drugs including Sodium Amytal (83) and after Goldberg told defendant that he would have to get new counsel because of Judge Metzner's direction and at a time when Goldberg was under pressure from the judge because of his inability to represent two defendants on trial at the same time.

The Minutes reflect plea bargaining involving an offer for a light plea to defendant's young brother for defendant's cooperation on outside events. During trial, a postal inspector testified that defendant made an oral statement to him on November 23, 1973 (1960) which inculpated him in the disposition of proceeds from the robbery alleged in Count 3 of the indictment. This statement was permitted into evidence

with redaction and was prejudicial to the defendant in the eyes of the jury and from a legal position. All other testimony against the defendant consisted of disjointed hearsay conversations from co-defendant accomplice witnesses who had made deals with the government for furnishing testimony.

The Fifth Amendment of the United States Constitution provides that no person in any criminal case shall be compelled to be a witness against themself. An involuntary or coerced confession is deemed inadmissible in Federal Courts (Bram v. U.S., 168 U.S. 532).

> "A confession or admission is involuntary or coerced if physical or psychological duress, promises, fraud or trickery overbear the defendant's will to resist and result in statements not freely self-determined ". (Spano v. New York, 360 U.S. 350).

Age, experience, mental capacity, methods employed by law enforcement officers, length of detention, manner of interrogation, are factors in determining whether a statement is false.

On December 8, the Court denied a motion for a suppression hearing and ordered the trial to proceed despite the circumstances surrounding the taking of the alleged oral statement from the defendant who was: incarcerated; newly released from a hospital after being injected with drugs to ascertain his competency; without counsel by direction of the court; under pressure because of a murder charge against his young brother which could be reduced to conspiracy if defendant cooperated.

An accused has a constitutional right to a full and fair hearing by the trial judge on the issue of the voluntariness of his confession before the confession is introduced into evidence (Jackson v. Denno, 378, U.S. 368.

ATTORNEY-CLIENT PRIVILEGE VIOLATED

During trial, information obtained by Hopper through the attorney-client relationship of defendant, was used by him in his capacity as attorney for co-defendant brother, with serious prejudice to defendant. (Rule 503, Fed.Rules of Evidence)

Using this knowledge, evidence was developed by Hopper that the killer-accomplice witnesses allegedly identified a spread of pictures as being that of defendant.(1193 - 1204) Since Hopper had previously represented defendant in this action, it was a violation of the 6th Amendment for the Judge to have permitted Hopper to appear for the co-defendant brother and violated the sanctity of the attorney-client privilege. Defendant never waived this privilege which is for his benefit. He couldn't. He was out in Springfield, Mo.

These actions deprived defendant of basic constitutional guarantees and deprived him of a fair trial and contravened due process of law.

POINT V

DEFENDANTS WERE PRECLUDED FROM A FAIR TRIAL BY THE ACTIONS AND ATTITUDE OF THE JUDGE PRESIDING WHICH REQUIRE A REVERSAL AND A NEW TRIAL

Due process of law, another way of defining elemental fairness, opportunity to effective counsel of one's own choosing, to confront witnesses and trial by jury are rights guaranteed to individual defendants guaranteed by Article 3 and Amendments 5th and 6th of the United States Constitution.

The entire structure of our judicial system is based on the supposed fairness and impartiality of the trial judge.(3ALRFed.420) In the instant case, this basic concept was violated by the Court through its concern with calendar, time, personality and general judicial prejudice which prevented the fairness and impartiality to which the defendants were entitled. This was manifested by procedures of the Court during the trial; rulings made by the Court from the jury selection to the verdict; trial findings by the Judge which invaded the province of the jury, overtly and covertly; unwarranted interference with defense counsel during cross-examination and other portions of the trial by means of sarcastic and vituperative remarks; by preventing defense counsel from developing proof and conducting examinations of witnesses in an orderly manner; through the process of interrupting at crucial points in the questioning and breaking his train of thought; by disparaging and attempting to make an involuntary witness of defense counsel; in pressing for stipulations to prosecution testimony;

by characterizing defense counsel's moves as unnecessary and time consumming; by frequently admonishing defense counsel to be brief and to move along and by limiting cross-examination of prosecution witnesses to protect and rehabilitate them. The Court's preoccupation with haste and procedural matters were detrimental and prejudicial to the substantive rights of the defendants.

The prosecution presented witnesses, exhibits in the trial from December 10 to December 26, 1973. There were four defendants under two joined indictments. The printed record exceeds 3 000 pages and the trial judge's unfair actions cover virtually every aspect of the trial. It is impossible to detail each and every prejudicial action of the Court particularly where defendants'appeal brief is so limited.

Several graphic illustrations of the complained of conduct are specifically illustrated in the following:

A. CROSS-EXAMINATION AND PROVINCE OF JURY HAMSTRUNG BY TRIAL JUDGE

Defense counsel were prejudicially interfered with in cross-examination, were disparaged and demeaned, attempts were made to make counsel involuntary prosecution witness through stipulations and upon refusal was met with impatience and animosity from Court, were interfered with and interrupted in their train of thought, were admonished to be brief and key prosecution witnesses protected by Court and supplied with answers and leads from the Court which greatly aided the prosecution to the detriment of the defense.

Count 1, Paragraph 2 of the indictment charged the defendants

specifically with robbing a mail truck. The following several pages of a typical cross-examination as hobbled by the Court illustrate more vividly than objective language the ability of an unfair referee to decimate defense counsel's most powerful weapons - cross-examination and respect of the jury.

(1870, Line 6) Turner - Cross-Examination

Q. Mr. Turner, there came a time where you said that the first time you went downtown to that area you saw a Hertz truck; is that correct?

A. The first time I saw the truck that was eventually involved, yes.

Q. And it was a Hertz truck?

A. Yes.

Q. Not a mail truck?

A. It was a Hertz truck with a U.S. mail sticker on the side of it.

Q. A mail sticker? Will you describe that, please?

A. Well, it was a white sign with black letters that said, "U.S. Mail" on it. It was pasted on the side of the truck.

Q. But it wasn't a silver, blue or regular mail truck of the United States Post Office was it?

A. No.

Q. It was a Hertz Rent-A-Truck, wasn't it?

A. That's correct.

Q. And that's what you intended to knock off, wasn't it?

THE COURT: Are you drawing a distinction between a truck rented by the United States Mail for carrying the mail from Hertz?

MR. MARTIN: Your Honor, I am not trying to distinguish anything. I am trying to ascertain facts from the witness. That's all I'm trying to do.

THE COURT: I'm sorry. You're going beyond that. You are also trying to draw a distinction in the jury's mind. You are certainly drawing it in my mind, and I will tell the jury it makes no difference whether the mail truck is owned by the United States Government or whether they rent it from Hertz for the use of transporting the mail.

Now, you may proceed, Mr. Martin.

MR. MARTIN: If Your Honor pleases --

THE COURT: You may proceed, Mr. Martin.

MR. MARTIN: May I approach the bench?

THE COURT: You may proceed, Mr. Martin.

MR. MARTIN: I can't approach the bench?

THE COURT: No.

Q. Can you describe this truck that you saw the first time when you followed it on its route?

A. It was yellow in color and it had Hertz on it and it had a U.S. mail sticker on the doors and on the side of the truck.

Q. Did you have occasion to notice the occupants of the truck that day?

A. No, I don't believe I saw them.

Q. You don't know whether there was a uniform on those occupants or not?

A. No, I do not.

Q. And when was this day -- question withdrawn.

MR. DIRENZO: May we approach the bench?
(At the bench.)

MR. DIRENZO: Do you mind excusing the witness, your Honor?

(Witness leaves the courtroom.)

MR. DIRENZO: At the point where Mr. Martin was attempting to elicit information concerning the fact that this was allegedly a Hertz rental truck and your Honor made the comments that you did, that it made no difference if it had U.S. Mail on it --

THE COURT: I went beyond that. I said it made no difference whether the truck was owned by the United States or whether they rented it for the purpose of carrying U.S. Mail.

MR. DIRENZO: I don't quarrel with that. I think we should be afforded the opportunity to go into the issues to whether this fellow recognized it and treated the contents on that truck as a Hertz rental truck without regard to the fact that there may have been mail on it, because if he is under the impression that this is a truck that is a conveyor or carrier of merchandise other than United States Mail, to that extent there is a certain area where I think they have to impute knowledge to the fact that he knew it, in fact, to be government property.

THE COURT: You are not talking about the Fifth?

MR. DIRENZO: No, sir, I am not talking about the Fifth. As I understand Mr. Martin's cross, he was attempting to show originally that all Turner learned was that there was going to be a job in New York, that he didn't know it was a mailtruck job, he says, until some time later, this some time later apparently being the day he went down and saw the truck, which was a Hertz truck, not the regular recognized U.S. mailtruck. The fact that it had a mail sign on it, a postal truck sign, didn't necessarily mean that he recognized it as being a conveyor of United States mail.

THE COURT: He has testified he saw the signs on that. Do you want to ask him, "Do you think there was mail on it or not?" Is that what you want to ask him?

MR. DIRENZO: I didn't ask the question, but I think that is what Mr. Martin may be trying to develop from the question.

THE COURT: That is not the way he put the question. Now, you know Massiello has made a barrel of money as far as renting trucks is concerned.

MR. DIRENZO: As far as Gentleman Jim is concerned --

THE COURT: You know that most of the trucks in New York are rented, don't you?

MR. DIRENZO: This is what I am attempting to establish. I can rent a truck; it may have U.S. Mail on it; I could be transporting merchandise other than U.S. Mail, but I don't rip that sign down everytime I transport other merchandise merely because I am not carrying mail at that particular point.

THE COURT: Why don't we reserve this point to you, Mr. Direnzo.

MR. DIRENZO: I want to leave it to more competent hands.

THE COURT: Counsel can go into that later. Bring the witness back.

Witness Myers was an admitted killer who was permitted to plead guilty to a lesser included offence under Court 2. While testifying he was flanked by his own attorney onthe right side of his witness stand and the Court on the bench to his left.

Page 1019 - Myers - Cross-Examination

Q. And how much scotch did you buy?

A. I think a half a pint.

Q. And did you then drink the beer and the scotch?

A. Yes, I did.

Q. And then, after drinking the beer and scotch, this six-pack and the bottle of scotch that you had, when after that --

THE COURT: Wait. Are you assuming he did, all at one sitting while he was sitting in the gas station; is that the implication of your question?

MR. MARTIN: I don't necessarily believe he was sitting in the gas station, your Honor. I am not assuming that is true.

THE COURT: You know that is not my point. You are assuming that he downed this all at once, and I don't think his answer justifies that assumption.

That is all I am saying to you, Mr. Martin.

MR. MARTIN: If your Honor please --

THE COURT: Now, please, Mr. Martin, I have made my point. That is all I'm putting to you.

MR. MARTIN: Are you restricting me from inquiring into it?

THE COURT: Obviously not, Mr. Martin. But I am trying to direct you to ask some questions that will have some meaningful answers.

MR. MARTIN: But, your Honor, I am not assuming ---

THE COURT: Mr. Martin, now, look, you know what I'm talking about. Please don't argue.

I'm saying the implication of your question is that he downed it all at once, and I don't think his prior answer justifies that implication.

MR. MARTIN: Well, if your Honor please --

THE COURT: Next question, Mr. Martin.

MR. MARTIN: I can't make a record, your Honor?

THE COURT: No.

MR. MARTIN: Respectfully except.

THE COURT: Not in this instance.

(1041 - line 23) Myers Cross-Examination

Q. When did you buy this 1967 Cadillac car?

A. I would say March of '72.

Q. You were not working at this time?

A. No.

Q. Where did you get the money to buy the '67 Cadillac car?

A. That is none of your business.

MR. DIRENZO: What is the answer?

THE COURT: He says that is none of his business and I sustain his objection.

MR. MARTIN: If your Honor please, I would like to object and move for a mistrial on that one.

THE COURT: Denied.

Q. Did there come a time when you sold that car?

A. When I sold it?

Q. Did there come a time when you sold that car?

A. Being I was arrested for this charge, I instructed my wife to give it back to the Ford Company which I bought it from. I didn't sell it.

Q. Did you finance the purchase of that car?

A. How can I finance something; I am not a finance company; I had it financed.

MR. KENNEY: Objection.

THE COURT: I sustain the objection.

MR. MARTIN: If your Honor please --

THE COURT: I have ruled. You can't have an argument on every objection.

(1106 - Line 13) Myers Cross-Examination

Q. There was some testimony, as I recollect it, by Chester Crawford; I think the day that you testified to was April 3rd and I think he said April 5th. Anyway, it was the day this killing took place that you said you fired the gun.

There was some testimony by Chester Crawford that you in fact visited an apartment on Houston Street that day and went with them at Katz' Delicatessen. Is that a fact?

A. Apparently I did visit somebody on Houston Street, but I returned, or I should say I came, to Katz' afterwards.

Q. What time did you visit these people on Houston Street?

A. I would say that afternoon. I don't know the time.

Q. What apartment was it? What house? What address?

A. The floor was the 13th floor. The apartment is very easy to find. It is the only one to the right. I don't know the number.

Q. Who was it that you visited?

MR. KENNEY: Objection, your Honor.

THE COURT: Sustained.

MR. MARTIN: May we approach the bench, your Honor?

THE COURT: No.

Q. How many people did you see there in that apartment?

THE COURT: I can't see the relevance to this at all.

MR. MARTIN: If your Honor please, I am trying to ascertain witnesses who may place him away from the crime. He testified before that he had been in certain places. We have other witnesses --

THE COURT: Next question, Mr. Martin.

MR. MARTIN: I move for a mistrial, if your Honor please, it is highly prejudicial to the defendants.

THE COURT: Denied.

Overconcern with haste, extended court days and pressure of Christmas, prejudicial. The following Court colloquy spells out one small incident. (1096 - line 9)

THE COURT: We are waiting for an alternate juror. I think we are going to sit until 6:30. You want to get through with this case before Christmas?

MR. DIRENZO: I'm not happy to hear it.

THE COURT: If cross-examination is going to take as long as it has, it's the only way we can do it.

MR. DIRENZO: I have one little personal problem. Judge Fraimen has indicated that he will want me to take care of a sentence before him in a murder case I recently tried, where the defendant was convicted of manslaughter, and he said I should make myself available either today or tomorrow and he will try to make it at 10 o'clock in the morning or 2 o'clock in the afternoon.

THE COURT: Do you want to make it 2 o'clock this afternoon?

MR. DIRENZO: If he wants me there at 2. The only reason why I mention it is we don't want to lose any time here.

THE COURT: If you want to go over at 2 o'clock this afternoon or 2 o'clock tomorrow, do so. How about 9:30 tomorrow?

MR. DIRENZO: I had even suggested to him I would get there, not knowing before time, I said I would make myself available at 4:30 or 5 o'clock.

THE COURT: We are going to have to go to 6:30.

MR. DIRENZO: If we are going to have a night session --

THE COURT: I don't want to have a night session in the sense of sending the jury out to dinner and have it come back. That will be too late. But I believe if we sit here until 6:30, that will help. So we are going to be sitting until 6:30 every night.

(Jury in box.)

Court's supplying of facts and directing evidence throughout trial indicated in following illustration. (1579)

A. yes.

Q. In disposing of that, don't you use a Brink's armored truck to ship it from place to place, the currency itself?

A. There are armored carrier and registered mail contracts for shipment of currency around the banking system.

Q. And they were private firms?

A. Yes.

MR. KENNEY: Objection, your Honor. Registered mail obviously is not with private firms.

THE COURT: You said registered mail.

MR. MARTIN: He said he had contracts with outfits.

THE COURT: Registered mail is registered mail. It goes through a post office somehow.

THE WITNESS: It is an arrangement with the postal service for the trucks to appear at the bank.

Q. Is it your testimony that this used currency is shipped by post office trucks through the mail?

A. I don't understand the question.

THE COURT: You dispose of old currency?

THE WITNESS: Found amongst currency deposits.

THE COURT: Do you ship those by mail as well as by private firms?

The foregoing illustrations are merely samples from the entire record where numerous other similar incidents permeate the pages.

(1607, 1608) The Court in referring to the defendant, Harry Johnson, said: "Harry was not around on the 22nd as I understand the testimony." It developed that Turner placed Harry Johnson in New York on March 22nd. (1610-1612) In this session with Mann cross-examination, the Court literally cross-examined and protected the witness from answering questions; (1620-1681)(which changed at 1677); (1693, 1800, 1823, 1829, 1830, 1834, 1844, 1846) At this point the Judge said June 20th Turner arrested; in fact not so. (1848, 1849)

Colloquy of prosecutor, court and defense counsel (335/356 Court Colloquy 521) Medical Examiner Tibere (461-462; 488 line 6 through 489 line 12). Accomplice witness Chester Crawford, 590, 619-621, 624-627, 633-634, 638, 652-654, 667-669. Colloquy Prosecutor-Defense Counsel, 760, 712, 713, 727-728. Accomplice Witness Paul Crawford, 793-794. Colloquy Court and Defendant, Tommy Carroll, 833. Accomplice witness Terrence Myers, 957, 988-996, 1043-1045, 1055-1056, 1062-1063, 1067-1073, 1089, 1103-1104, 1124, 1173-1178, 1200-1201, 1205-1219. Witness Dexter, 1246. Accomplice witness Geoffrey Mann, 1302-1303, 1464, 1470, 1480, 1481, 1493, 1503, 1519, 1522, 1530, 1543, 1549, 1533 through 1560. In this instance the Court was attempting to compel me to stipulate to the contents of a mail truck. The Court (1558) indicated that

defense counsel had objected to every piece of evidence that had come in and cross-examined a witness for no point whatsoever; challenged one defense counsel and pressured the same defense counsel as to whether Mr. Hickey was killed; attempted to intimidate the same counsel to agree that there was no dispute as to an attempted robbery of the mail truck. The pressure was severe. This was compounded wher the Court, after calling in the Jury, told them that the Court was conferring for 3/4 of an hour to shorten the testimony. The entire testimony, including colloquy, swearing and objections, only encompassed 37 pages which took less time than the discussion between the Court and the attorneys. 1853-1854, 1855-1856, 1857-1860, 1886, 1903, 1904, 1907 (same as 1846) 1925, 1926, 1928, 1929, 1930, 1939, 1940, 1941, 1950, 1954, 1955, 1956, 1958, 1959, 1963, 1964, 1965, 1967, 1970, 1994, 1996, 1863, 1866.

B. Procedures with Jury

When the trial commenced on December 10, 1973 the Court unilaterally selected the jury and propounded all of the questions without participation of defense counsel (357). Empanellment of the jury commenced at 11:40 (325). There was a lunch recess at 1:30 (325); court convened at 2:10 (325) empanelling of the jury continued and by early afternoon (326) a jury of 12 and 4 alternates were selected and sworn, leaving sufficient time for opening statements by the prosecution and defense counsel to be completed by 4:30 that day (350). The following morning, the prejudicial rapidity with which the jury was selected became evident. One

of the jurors indicated that the examination was cursory (358) with the result that the Court eliminated two jurors who were replaced by two alternate jurors. (365-368)

Throughout the trial the jury was advised that theCourt was trying to finish the case before Christmas (521); the jury was present when counsel were prodded by the Court's hope that cross-examination would not be too long. (351)

Summations were severely limited and were not held on the day following the end of the evidence part of the trial on a Friday, but instead were held on Christmas Eve which fell on a Monday during a four-day weekend. (2003)

During its deliberation the jury requested certain testimony which theCourt short circuited, resulting in a limited partial reading, distorting to the advantage of the prosecution the re-read testimony.

C. Procedure Followed with Defendant Accomplices turned Prosecution Witness.

The only direct testimony relied upon by the prosecution to connect the defendants to the alleged crimes consisted of testimony by five co-defendants accomplices turned prosecution witnesses. These witnesses made deals with the prosecution to plead to the first count of the indictment or to lesser offenses included in the second and third counts of the indictment and their cooperation could affect their sentences.

When Chester Crawford, the first of such witnesses appeared, the prosecution gave to the Court undated authorizations

from the Attorney General (144) to apply for use immunity for each of these witnesses to alleged events of a robbery on March 22, 1973 which was not specifically charged in the indictment either as a count or as an overt act. The prosecution permitted the witnesses to testify to all other events and then cross-examined after which the Court would grant immunity and then the witnesses would be questioned both directly and by cross-examination on the events of March 22, 1973 under sue immunity. (494) (Title 18 U.S.C.6003)

Instead, the Court ordered the following pattern: it signed the order granting immunity without checking with the first witness (501 & 510) and before defense counsel had the opportunity to read the underlying papers (498). The Court took the position that defense counsel had no standing to inquire into or question the procedure followed. (498)

Although each of the witnesses were testifying for their own benefit on the events in the indictment or under immunity for the outside events, the Court provided that each witness be attended by his attorney who was to sit at the side of the witness in the presence of the jury while he testified and with whom the witness could consult. It would seem that this was a means which permitted the jury to give greater weight to these carefully cared-for witnesses. Flanked and protected by eminent counsel, immune to much cross-examination, the witnesses came across with more respect and standing than they would have if permitted to come before the

jury as the plain, simple, convicted felons, murders and informers that the record reflected and the symbol of justice was gagged as well as blindfolded under these events.

D. Lack of Jury Control

At trial, the jury mingled with witnesses and observed the defendants in handcuffs while in transit and were exposed to prosecution defense counsel. They used the same bathrooms, telephone facilities and mingled in the hall with witnesses, government investigators, defendants and onlookers. (777)

E. Inability of Counsel to Consult with Defendants

At trial (350) the Court was advised that defense counsel wished to regularly consult with the three imprisoned defendants. Judge Metzner suggested that the matter be taken up with the prosecutor and marshal to have arrangements made but that the court did not have power to make appropriate provisions. (354) The prosecutor announced arrangements to have the defendants available earlier in the morning and after trial. It developed, however, that the prisoners were often brought to court later and the trial was subsequently extended to 6:30 P.M. (1097)

Prosecution witnesses who were testifying, were housed together in certain instances where as one completed testifying he would be placed in the same facility as a witness who was about to testify. (730-731)

F. Rulings by the Court during Trial Constituted Prejudicial Error Depriving the Defendants of a Fair Trial

The trial motions and objections made covered a wide area. While any one adverse ruling by itself might not constitute

prejudicial error, the accumulation of many tainted the proceeding.

Unnecessary hearsay testimony was indiscriminately allowed tc remain in the record concerning "Italian dudes", "Synidcate", "Capo" "Mafia", "Family" and "Organization". The defendants were not charged with being any of the foregoing but the remarks could impress the jury and cause them to find the defendants guilty as criminal "Mafia".

Unconnected testimony was permitted to remain in and it was not subsequently stricken out by the trial judge. (887-888).

Witness Parra identified Government Exhibit 4 as being Post Office records for William McCloskey in front of the jury. Motion for mistrial denied causing severe prejudice due to subsequent testimony that acts charged in indictment committed with inside Post Office information. (688) The Court instructed the jury not to speculate as to what the Exhibits contained, but this was insufficient to offset the privilege. (439)

Reference is made to multiple erroneous rulings. Prosecution opening and closing, acting as witness and giving testimony, inflaming the jury, inferring in summation racial misuse by defendants (335, 339, 260 & 2135); denial of continuance when severed with Bill of Particulars during trial (362, 363); failure to exclude oral testimony of witness Boyd's criminal record (539); failure to strike out Rippy conversation (539-540); failure to strike out records on tavern telephone call (544); hearsay testimony of Chester Crawford; vague and irrelevant testimony of Boyd (748); leaving testimony implying defendants a felon (900-901); other

selected examples contained on 1153, 1200, 1201, 1204, 1206, 1223, 1419, 1420, 1421, 1434, 1440, 1441, 1451, 1452, 1494, 1496, 1503, 1520, 1537, 1538, 1571, 1693, 1713, to 1714, 1715, 1790, 1849. BIRD V. U.S. 180 U.S.356; SUNDERLAND V. U.S., 19F.2nd202; BOLLENBACH V. U.S., 90L.Ed.350; WILSON V. U.S., 250 F2d312; JOHNSON V. ZERBST, 304 U.S.458.

POINT VI

PROCEEDINGS THROUGHOUT POISONED BY EFFICIENT ADMINISTRATION TO THE DETRIMENT OF DUE PROCESS

The procedural system followed in the Court below, from the first filing of the indictment, through and subsequent to the trial of this action, while carefully wrought with token procedural due process, in fact, deprived the defendants of substantive due process and a fair trial in contravention of their Constitutional rights.

The case was assigned to a trial judge who thereafter handled all of the proceedings from arraignment under the indictment to sentencing on the pleas and convictions. While this is an efficient means for moving a case, it clouded the judgment and objectivity of the individual who held the position of judge. This case involving 10 defendants, all with different legal postures, required the same man to sit through a trial and objectively preside thereover with a presumption of innocence, carrying the defendants into the arena.

For months before the trial commenced, this same man was met with many pretrial motions upon which he ruled; and which required inquiry into many facts of the case; there were motions addressed to the Grand Jury minutes, there was 3500 material available and accessible. In September pleas of "guilty" were made by some of the defendants. The allocutions were detailed and necessitated findings as a fact that the defendant, Myers, fired a shot from a revolver which penetrated through the head of a postal employee while in a postal truck, and that that same bullet then wounded

another postal employee, driver of the postal truck. The Judge was obligated to find that the defendant, Mann, joined Myers in the robbery attempt as an active participant and that the defendant, Chester Crawford, passed the guns to Myers and Mann. He had to find that the defendants, Paul Crawford, John Turner and Harry Johnson had each joined in and committed a conspiracy charged in Count 1 of the Indictment, and that at least one of the overt acts of the indictment had been committed.

He had to find, as a fact, that the defendant, Turner, committed an assault upon the driver of the truck, but did not wound him with a .32 caliber revolver. The same Judge was compelled through the course of the preliminary hearings, pleadings and motions to ascertain evidentiary facts and details in sufficient quality and quantity to prove to him that these defendants who pleaded "guilty", in fact were guilty.

Could any mortal man, however trained, learned, unbiased, understanding and fair, have the ability, after being exposed to the foregoing dealings with these defendants cleanse his mind and fairly preside at a jury trial of co-defendants who have pleaded "not guilty" without conveying to the jury the findings that he himself had made? Can the presumption of innocence filter through this wall of ultimate fact?

Forgetting for the moment, however, the unique position of the man with the robe in his dealings with the defendants, the method of dealing with a fundamental constitutional right to

counsel by the defendants in multiple case situations is abhorrent to the goal of fair play and justice. The same Judge who conducted the criminal proceedings from start to finish, appointed attorneys for each indigent defendant, Chester and Paul Crawford, Terry Myers, Geoffrey Mann, John Turner, Harry Johnson, and Robert Rippy. He also appointed one attorney to represent Robert Rippy on one occasion, and thereafter appointed that same attorney on the eve of trial to represent defendant, Vincent McCloskey, who was not even indigent.

The same man then was required to approve payment for the attorneys whom he had appointed to represent the defendants. Before payment, the attorneys submitted to him for approval, claims for legal services performed under his assignment. Even lawyers as officers of the court might be susceptible to bad judgment, self-serving at the expense of clients when faced with a dual obligation-responsibility to the Judge-service to their client. Ordinarily a two-headed position might be maintained under the code of ethics but it strains reason to expect that a man, even though an attorney, could be in a position to effectively:

a) Urge rulings which might be distastful to the court Judge;

b) Fail to sign stipulations strenuously urged by the court;

c) Request time for continuances or hearings when time presses the court, if that man is dependent for his bread and butter, not upon the client whom he represents, but upon the Judge who is an employee of the people in general.

The use immunity granted by the Court, not only was illegal because of the procedure adopted, but its flagrant use, time and time again, during the trial was substantively abusive to the defendants. Five defendant-accomplice-informers were granted immunity on application of the United States Attorney, supported by undated letters from the Assistant Attorney General.

The classic right not to testify is given to an individual under the constitution, not to the government. If the statute permits the government to apply for and receive immunity for a witness during a plenary trial, then it is unconstitutional under the due process clause of the Fifth Amendment and because of the right to a fair trial, it tips the scales of justice by giving a strong weapon to the prosecutor and making it unavailable to the defense.

In addition to the basic unfairness of the use immunity statute, its implementation in this case distorted fair play. Undated letters were presented to the Court from the Attorney General's office with authorization for the local prosecutor to make application for immunity. Applications and proposed orders were prepared and submitted to the Court prior to the time when the government witness personally indicated that he would avail himself of his Constitutional privilege.

The defendants at least had the right to have the witness decide question by question or area by area as to which queries he wished to answer as to which he wished to invoke his Constitutional privilege.

This case permitted the prosecution and the Court to remove that option from the witnesses and retain it for themselves. The prosecution's position was biased and the Court could not substitute its need for the witness.

The foregoing shredding of due process was compounded even further when all of the court-appointed attorneys representing the accomplice-informers were permitted to consult with the witnesses, to sit at their side while testifying, under order of the Court in full view of the jury so as to accord to these tainted witnesses a status that they certainly did not have.

More succinctly, one of the inherent dangers was brought out by a Freudian slip of one of these court appointed and Government paid counsel, when he said: "It is necessary for me to consult with the witness to tell him what to say."

The Court predetermined the facts, rewarded and punished the defendants, not according to what they did, or how they were involved, but because of their cooperation or lack of cooperation with the prosecutor; it played musical chairs with defense counsel, both paid and unpaid, and caused ruptures in the Constitution dealing with the personal privilege against self-incrimination, all in derogation of the defendants' rights to a fair trial and due process of law. Section 6002 U.S. C. Title 18 Amendments 5 & 6 U.S. Constitution.

POINT VII

IT WAS ERROR TO INSTRUCT THE JURY THAT WITNESSES WERE EQUALLY AVAILABLE TO BOTH SIDES

The defense issued a subpoena against the Post Office requiring it to produce its records concerning the events and individuals and information contained therein on the events of 4/5/74, that being the day alleged by the prosecution for the charges in Counts 2 and 3 of the indictment. The prosecution moved to quash this subpoena and its motion was granted (1092 1098).

Testimony had revealed that the regular driver of the truck had remained out ill on 4/5/73. The prosecution did not supply his name or address nor did it produce him as a witness. In chambers, the prosecution advised defense counsel that this potential witness was not with the Post Office Service but was with the army and had been interviewed by a postal inspector. (1308) He was not made available to the defendants nor was his name and address supplied nor was the agent who interviewed him produced, although promised. Subsequent testimony that the events of 4/5/73 were attempted with "inside information" required defense counsel to have those people available for use on the trial.

There was testimony in the record that the regular guard on this route was not on duty on April 5, 1973. This information was not furnished to defense counsel. Guns and bullets alleged in the incidents were not introduced by the prosecution during the trial.

Post Office records would have contained the caliber and disposition of the gun carried by convoy Hickey at the time of

of his death and perhaps establish that the bullet which struck Lawrence came from that gun--thus vitiating count 3 of the indictment.

The subpoena could have possibly furnished this necessary information to the defense for it's use during its presentation of the case.

It was error to quash the subpoena. The court at least should have examined the records "in camera" and then permitted defense counsel to introduce into evidence relevant portions. (Rule 16 Fed R. Cr. P.)

Co-defendant prosecution witnesses while technically available to defense counsel through cooperation with the prosecutor, as a practical matter were unavailable. They made deals to testify and had court appointed counsel to protect their rights. Obviously they would not have been permitted by their counsel to give statements to or cooperate with defense counsel and antagonize the prosecution.

A very interesting potential witness was co-defendant, Harry Johnson. In chambers (1307) when defense counsel stated he would like to interview Johnson, the prosecution hedged the request and implied that the defendant was some hundreds of miles away from New York. The prosecutor was, during the trial, in frequent contact with this witness through his attorney, Florence Shientag. She lists many meetings and communications with the prosecutor on behalf of the witness.

On December 6, prosecutor contacted counsel for Johnson

saying he wanted Johnson in New York the following Tuesday to see if he would use him as a witness. Johnson's attorney was eager for him to testify in hopes of receiving a lighter sentence. After trial commenced, Johnson's counsel tried very hard to have him testify. On December 11, Johnson was in New York and an appointment was made for him to be interviewed by the prosecutor that day. Various calls and notes were made between counsel and the prosecutor regarding his possible use as a witness (2526).

With the witness available in New York, during the trial, the prosecutor, was less than candid when he did not make the witness available to defense counsel.

There was testimony by Turner that Harry Johnson was present 3/22/73 when the alleged payroll robbery took place. Other prosecution witnesses were granted immunity to testify and it would have greatly added to defendants case to have Johnson available to testify without immunity, or to request the Court to grant the same immunity to Johnson, as was granted to the others. He could have contradicted the other witnesses and when not called, although available to the prosecution (the jury could infer that his testimony would have been favorable to defendants.)

Much stress was placed on the telephone messages, bills and massive records introduced. The prosecutor called neither Maria Vasquez, nor Linda Myers, and who were close to two of the

prosecution witnesses, Myers and Chester Crawford. The prosecution had months to prepare and speak with Linda Myers and Maria Vasquez and in fact did speak with Maria Vasquez. Defense counsel had no opportunity to question them until names appeared on trial. Prosecution also favored by ability to name them as co-conspirators. (1434),(1395).

During cross-examination, counsel attempted to ascertain the names and location of the individuals who Myer claimed to be with on 4/5/73 around the time the events charged in Counts 2 and 3 of the indictment occurred. (1105) (1107). The court did not permit defense counsel to develop this information. These witnesses were available to the prosecution because of the cooperation of Myers. These witnesses with whom he testified he was with on 4/5/73 could possibly give testimony placing Myers in a different location at the time of the events in Counts 2 and 3 of the indictment. Since Myer was found by the Court to be the killer, it disproves the Governments' entire case.

POINT VIII

DEFENDANT, WILLIAM McCLOSKEY, WAS DEPRIVED OF LEGAL COUNSEL AND BY RULINGS DURING THE PROCEEDINGS WHICH DEPRIVED HIM OF DUE PROCESS OF LAW AND HIS CONSTITUTIONAL RIGHTS

The 6th Amendment of the United States Constitution provides that in all criminal prosecutions the accused shall enjoy the right to have assistance of counsel for his defense. Kirby v. Illinois, 406U.S.682, Miranda v. Arizona, 384U.S.436, Fed. Rules Cr. Proc.44(a).

The indictment under which this case was tried was filed in October of 1973 with co-defendant, Harry Johnson, which was joined for purposes of trial with another indictment filed in June of 1973, involving eight different defendants. But the charges and counts in both were the same. Defendant voluntarily surrendered to authorities when the indictment was filed and the eight different defendants were being readied for trial. One of the defendants in the other indictment was this defendant's brother, Vincent McCloskey.

When criminal proceedings commenced herein, arrangements to retain defense counsel were made by defendant's family in New York because he was living in Florida. Donald was at this time co-counsel for defendant's brother, which fact was not then known by defendant.

Hopper had appeared, (2690) made motions on bail and in discovery proceedings for defendant's brother, as sole attorney from June to August. When he was joined by Goldberg as trial counsel (2876) he continued to act as co-counsel for Vincent. In October he was retained by defendant's family and requested permission

from the Court to appear for this defendant who was unaware of the arrangements. (2875)

Judge Metzner permitted Hopper to be relieved as co-counsel for defendant's brother and Hopper continued to represent defendant through trial. Fundamental error under the 5th and 6th Amendments to the United States Constitution was committed when defense counsel was permitted by the Court to extract himself from his obligation to one defendant in order to represent a co-defendant where both defendants were tried together.

The privileged communication between attorney and client is sacrosanct and this privilege was not waived by defendant Vincent who was in Springfield Missouri undergoing mental examination. (2875, 80/83)

It was incumbent upon the court as a minimum duty to inquire into the knowledge and consent of the old and new clients instead of relying on a representation that "everything was alright" by Hopper. (2876 lines 2 through 7)

PRETRIAL AND TRIAL REPRESENTATION

Defense counsel failed to make any written motions addressed to the pleadings although given to November 16, 1973 at plea on October 24, 1973 (5), or for discovery and inspection, or any other purpose, except to request permission for defendant to return to his home in Florida while awaiting trial.

During trial, counsel's defense posture was less than formidable and included harmful cross examination (1206), willingness to enter into unexplored complicated stipulations (1556), willingness to

forego objections to potentially damaging evidence (1206), requesting insufficient time to present defendant's case in summation (2002) and overly strained adherence to limiting cross-examination and a general inattention to defendant's case, including failure to supply requests to charge as required by Court resulting in the Court not accepting the same when presented on December 21, 1973. (2012, 2013)

CO-DEFENDANTS' ORAL ADMISSIONS DURING TRIAL

The prosecution introduced into evidence oral admissions of defendant Rippy (1220) and defendant's brother, Vincent McCloskey (1960). These oral admissions had no connection to the defendant and were highly prejudicial.

While the Judge instructed the jury that these admissions were not to be used against the other defendants, this statement could not undo the great prejudice to the defendant from these inculpating statements of co-defendants in a joint trial particularly where the last name and relationship of one of the co-defendants was the same and could be easily confused by the jury.

Defendant was not able to confront the co-defendant witnesses who did not subsequently testify and thus violated the confrontation clause of the 6th Amendment (Bruton v. U.S., 391U.S.123, U.S. v. Morales, 477F2d1309).

AS TO ADMISSIONS OF UNRELATED CRIMINAL ACTIONS

As detailed in Point V , three independent crimes for which none of the defendants were charged, tried or convicted were introduced into evidence at trial, one an alleged payroll

robbery, another an alleged theft of a station wagon and the third an alleged theft of a step van. The evidence did not establish that this defendant was involved in any of these outside crimes, and their admission into evidence was highly prejudicial to this particular defendant. (J.Wigmore,Evidence, Sec.194 pp.646,648,(3dEd),U.S. v. Baum, 482F2d1325).

Nowhere in the indictment did the facts and circumstances of these outside activities of other defendants appear as overt acts or otherwise and defendant had no way of ascertaining that this evidence would be presented.

On trial a written motion and supporting memoranda was filed (151 to 161) which motion, as all other motions in the case, were considered as being made by all the defendants and which motion was denied.

The government attempted to enter into evidence Post Office employment records of William McCloskey, This information was furnished in front of the jury and while the judge subsequently instructed the jury that they were to disregard this fact, it was highly prejudicial and permitted the jury to draw an inference that defendant was employed by the Post Office at or about the time of the robbery and supplied inside information concerning the evidence alleged in the indictment. This was highlighted by co-defendant testimony implying an inside job. (432) The Court should have granted a mistrial as requested. (437)

GOVERNMENT'S CONDUCT

Taken at best, the evidence adduced might establish defendant as a peripheral figure and not a principal in the charged violations. Nowhere in the evidence was there any testimony that defendant knew anything of the conspiracy and the admitted killer and his partner could not even identify defendant during trial.

The indictment against defendant was filed in October despite prosecution's completed investigations in June. Defendant was offered a chance to plead guilty to conspiracy if defendant's brother pleaded guilty to murder in the second degree and cooperated in furnishing information not for the evidence charged in the indictment, but for outside unrelated evidence, knowledge of which was obtained by the prosecutor through the tapes divulged by the Court in the Minutes for September 17, 1973. (2844)

The government permitted Harry Johnson and Paul Crawford to plead guilty to conspiracy as secondary actors but held the defendant as bait to compel defendant's brother to become an informer for the government in unknown areas outside the scope of this case. Even the prosecutor in his summation recognized the weakness of his case against the defendant. (2139)

This scheme and design by the government is more than reprehensible. It was improper, illegal and violated due process and deprived the defendant of a fair trial.

POINT IX

COUNTS 1, 2 AND 3 OF THE INDICTMENT SHOULD BE DISMISSED AGAINST THE DEFENDANTS WILLIAM McCLOSKEY AS A MATTER OF LAW

COUNT 1:

Count 1 of the indictment charges the defendants, during the period January 1 through October 1973, with unlawfully, wilfully and knowingly conspiring, confederating and agreeing together and with each other to violate Sections 1708 and 2114.

It was charged that a part of the conspiracy was that the defendants would steal and take mail bags from a mail carrier and mail truck in violation of Section 1708 or that in attempting to effect the robbery of people having control of mail matter that they would and did put in jeopardy the lives of the said persons by the use of dangerous weapons.

Three innocuous activities are listed as overt acts and the charges are brought under Section 371.

The court correctly instructed that the jury must be convinced beyond a reasonable doubt that each defendant had knowledge sufficient for him to enter into the conspiracy. This element was not proved beyond a reasonable doubt by the credible evidence in the record.

In his summation, the prosecutor evidenced concern with the lack of evidence against William McCloskey (1792). He argued the following incidents established beyond a reasonable doubt that William McCloskey had knowledge of the conspiracy.

a) Chester Crawford said he met with Jack, Mike, Tommy and Billy was there also; that he saw Billy McCloskey at Maiden Lane on 3/29/73; that he was in Katz's and in a car on a day;

b) That Carlton Boyd identified the defendant in the courtroom;

c) That Mann met a man called Billy in Pennsylvania who was riding in a station wagon with his brother and saw him once more on Maiden Lane where he said "the truck was coming".

d) That Myers testified that there was a young man in a station wagon on 3/29 in Pa.; that he was Billy in a car on 4/5;

e) Turner said Billy was in a car.

Chester Crawford never testified to any conversations or incident upon which a jury could logically infer that the defendant, William McCloskey, could intelligently have knowingly entered into the conspiracy listed in this indictment. (556-578) (586/588) (715/719)

Carlton Boyd at no time testified to any act or conversation with the defendant William McCloskey from which knowledge could be inferred. Boyd did not testify to any specific conversations when the defendant, William McCloskey was present, or even that he was close enough to hear a general conversation. (739, 747).

Mann confronted William McCloskey on trial and said that "Billy" the man he met in Pa., on Maiden Lane and in a station wagon was not in the courtroom and denied knowing the defendant, William McCloskey who was in the courtroom being confronted. (1691).

Myers who met a "Billy" in Pa. and saw him again on 4/5 at Maiden Lane, specifically failed to recognize the defendant,

William McCloskey, when confronted in court and said that the Billy he testified about was not in the courtroom (944).

Turner's testimony that Billy was in a car did not evidence knowledge (1759).

The following cases have held that to convict a defendant of conspiracy, the Government must show at minimum that the defendant had knowledge of the intended crime. A conspirator must have knowledge of the objective in order to agree to it and must have knowledge of the act which makes it a Federal crime. (U.S. v. DeMarco; 488 F2d. 828; U.S. v. Gallishaw; 428 F2d. 760; U.S. v. Crimmins; 123 F2d. 271; U.S. v. Pacelli; 491 F2d. 1108; U.S. v. Alsondo; 486 F2d 1339).

An analysis of the foregoing witnesses coupled with total lack of evidence against the defendant, William McCloskey, compels a finding that Count 1 of the indictment should be dismissed, because of the complete failure to prove knowledge beyond a reasonable doubt (1792).

COUNT 2:

There was insufficient evidence in the record to support a finding by a jury that the defendant, William McCloskey, knowingly, with malice aforethought and as a perpetrator and attempted perpetrator of a robbery, murdered and killed Hickey who was guarding a U.S. mail truck either as a principal or accomplice.

There is insufficient evidence to support this finding beyond a reasonable doubt (1792).

COUNT 3:

The same argument applies for the defendant William McCloskey on Count 3 of the Indictment (1792).

Counts 2 and 3 of the indictment should be dismissed against William McCloskey because the evidence does not support a finding that he was guilty beyond a reasonable doubt.

POINT X

DEFENDANT THOMAS CARROLL WAS DEPRIVED OF COUNSEL, OF HIS LIBERTY TO DEFEND HIMSELF AND IN GENERAL WAS DEPRIVED OF DUE PROCESS OF LAW

The 6th Amendment, and interpretive cases, provide an accused the right to counsel for his defense, which continues through every critical stage of the criminal prosecution. Defendant may need the assistance of counsel at any stage to deal with the intricacies of the law (U.S. v. Ash, 37L.Ed.2d.619) This is deemed so fundamental to the interests of justice that its denial automatically vitiates a conviction obtained even without a showing of prejudicial unfairness or the need to counsel. (Ferguson v. Georgia, 365U.S.570)

Defendant appeared alone at sentencing on January 25, 1974. His counsel was ill and confined in a hospital.(2934).The court announced receipt of a letter from him requesting that all motions submitted on behalf of a co-defendant be deemed submitted on behalf of the defendant (2934) to which was added a pro se motion to acquit which was accepted by the Court. (294) (304).

Specifically the Court found no necessity for the presence of defense counsel and no reason for adjournment implying that defense counsel could add nothing in view of the mandatory sentences on two of the three counts in the indictment. (295) The complicity of the statutes under which defendant was convicted required the court to at least adjourn the sentencing of the defendant to enable hospitalized defense counsel to speak to the Court and perhaps by spelling out errors in the charges of insuffi-

ciency of the evidence all by interpretation of the statutes might cause it to set aside the verdict and to order a new trial or to lighten the sentence. The written order dated January 25, 1974 was entered explaining the reason for refusing to adjourn the sentencing. (295)

Defendant made a motion filed on December 6, 1973 requesting the Court to grant him the right to act as co-counsel with his attorney (86) He had written to the Court on September 27 (86) and December 6, 1973 (86) (146) saying that he was without funds and unable to hire investigators or pay counsel who, despite this, continued to represent him.(149) The letters showed he was individually working on the case while incarcerated and it appeared that he sincerely wished to function as co-counsel, assisting his trained attorney. This motion was denied (452) The letters also state that defendant under $200,000 bail, was held in segregation away from co-defendants on orders from the prosecutor. That he was unreasonably transported and forced to appear in Court with two co-defendant prosecution witnesses who previously failed to identify him but were able to after seeing him in Court. That the government and its agents, harrassed him and his family, that he needed financial help for his defense and that he could not reach witnesses, hire investigators, or help his unpaid attorney establish a defense because of his financial inability and restraint of liberty. The Court was reminded that co-defendants were out on low bail.

The letters eloquently spell out the facts and cry for aid fromthe Court to help him prepare his defense. Where, as in this case, the Court authorized thousands of dollars for investigation, minutes and legal fees for six co-defendants turned government witnesses, it had a duty to the defendant to grant him funds for help in his defense or at least to hold a hearing to inquire into the conditions claimed by the defendant. The Court did neither, causing defendant to be deprived of a fair trial and to be deprived of the rights accorded six co-defendants in violation of the equal protection provisions of the United States Constitution. (Article 3 and 5th and 6th Amendments to U.S. Constitution; Miranda v. Arizona, 384 U.S.436; Kirby v. Illinois, 406.U.S.682; U.S. v. Ash, 37 L.Ed.2d619, 1973; Fed.RulesCr. Proc.Rule 44(a); Pate v. Robinson, 383 U.S.375.)

CO-DEFENDANTS' ORAL ADMISSIONS DURING TRIAL

The prosecution introduced into evidence oral admissions of defendant Rippy (1220) and defendant's brother, Vincent McCloskey.(1960) These oral admissions had no connection to the defendant and were highly prejudicial.

While the Judge instructed the jury that these admissions were not to be used against the other defendants, this statement could not undo the great prejudice to the defendant from these inculpating statements of co-defendants.

Defendant was not able to confront the co-defendant witnesses who did not subsequently testify and thus violated the confrontation

clause of the 6th Amendment. (Bruton v. U.S., 391 U.S.123; U.S. v. Morales, 477F.2d1309).

In view of the foregoing it is requested that the judgment be vacated and a new trial ordered.

POINT XI

THE COURT FAILED TO ESTABLISH THAT DEFENDANTS WERE TRIED UNDER A VALID INDICTMENT

On December 10, 1973 in open Court (122), defendant moved for a Judgment of acquittal under Indictment 73-855 claiming that the indictment was not executed by the foreman of the Grand Jury and by the U.S. Attorney (101).

Rule 7 of Title 18, Federal Rules of Criminal Procedure govern the contents and handling of an indictment. Rule 6 empowers the Grand Jury to find and return an indictment to a judge in open court by the foreman in writing (Rule 6 (f). Rule 7 (c) provides that the indictment shall be signed by the attorney for the Government.

Defendant in support of his motion submitted an affidavit and exhibits (101 to 133) which contained facts which could support a finding that the indictment, filed on September 11, 1973, did not contain the requisite signatures. Some exhibits, furnished as Certified Copies of the indictment, appeared on their face not to contain such signatures.

The defendant contended: That no signatures appeared; that the unsigned indictment was certified by the Clerk of the Court as a true copy of the original at a date subsequent to the proceedings; that there was no true bill.

Request was made to produce the Grand Jury foreman and/or transcript of the proceedings, as well as the U.S. Attorney to

inquire into the matter.

During the trial, the court without witnesses or hearing, denied the motion (125). If, in fact, the indictment was not valid defendants were falsely held and tried to their great prejudice. In view of the serious question posed, the court was obligated to conduct a hearing into this question of jurisdiction to ascertain when and if valid signatures were signed to the document.

The error violated constitutional and procedural rights, requiring an immediate release of the defendants. (U.S. Constitution; Rules 6 and 7 Fed R. of Cr. Proc.; Ex Parte Bain; 121 U.S. 1).

POINT XII

IT WAS ERROR FOR THE COURT TO DENY MOTIONS AT SENTENCING

At the end of the prosecution's case, defendants moved for acquittal which was denied by the Court. (1982, 1983, 1992).

On January 25, 1974, written motions were submitted to set aside the verdict of the jury; for a new trial; for judgment of acquittal; and to dismiss the indictments.

The court wrongfully denied these motions.

POINT XIII

IT WAS ERROR FOR THE COURT TO DENY MOTIONS DATED DECEMBER 6 AND DECEMBER 7, 1973

Defendant Vincent McCloskey moved for a severence, adjournment, inspection of grand jury minutes, extension of time to move to dismiss indictment: (a) dismissal of indictment under

Count 1; (b) for deprivation of counsel; (c) for violations of due process of law; for a suppression hearing, for disclosure from F.B.I. and Post Office, for agreements with co-defendants, for separate trial, and for a hearing to inquire into the facts and circumstances necessary to determine all of the matters.

The multiple motions dated December 6, 1973, were made by defense counsel who entered the case on December 4, 1973, five days before trial, at a time when defendant had not read or pled the indictment.

CONCLUSION

The judgment of conviction should be reversed and the indictment dismissed, or, in the alternative, a new trial should be ordered.

Respectfully submitted

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Attorney for Appellant
Vincent McCloskey

LOUIS F. MASCARO
Attorney for Appellant
William McCloskey

MICHAEL P. DIRENZO
Attorney for Appellant
Thomas J. Carroll

A 201 Affidavit of Service by Mail — LUTZ APPELLATE PRINTERS, INC.

U.S. COURT OF APPEALS:SECOND CIRCUIT

U.S.A.,
Appellee,

against

CARROLL, et al,
Defendants-~~Appellees~~Appellants.

Index No.

Affidavit of Service by Mail

STATE OF NEW YORK, COUNTY OF NEW YORK ss.:

I, Laurel N. Huggins, being duly sworn,

deposes and says that deponent is not a party to the action, is over 18 years of age and resides at

1050 Carroll Place, Bronx, New York

That upon the 10th day of June 1974, deponent served the annexed Appellant's Brief upon Paul J. Curran--U.S. Attny. So. District attorney(s) for Appellee in this action, at Foley Sq., New York

the address designated by said attorney(s) for that purpose by depositing 2 true copies of same, enclosed in a postpaid properly addressed wrapper in a Post Office Official Depository under the exclusive care and custody of the United States Post Office Department, within the State of New York.

Sworn to before me, this 10th day of June 1974

Laurel N. Huggins

Print name beneath signature

LAUREL N. HUGGINS

Robert T. Brin

ROBERT T. BRIN
NOTARY PUBLIC, STATE OF NEW YORK
NO. 31 - 0410950
QUALIFIED IN NEW YORK COUNTY
COMMISSION EXPIRES MARCH 30, 1975